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In The

SUPREME COURT OF THE UNITED STATES

73 - 5520

MARGARET MAE CANTRELL, et al.,

Petitioners

vs.

FOREST CITY PUBLISHING CO., a corporation,
JOSEPH ESZTERHAS and RICHARD T. CONWAY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Margaret Mae Cantrell and William David Cantrell, respectfully pray that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Sixth Circuit to review its judgment, accompanied by an opinion, at No. 73-1081, dated and entered September 10, 1973 (App.1), reversing judgment for petitioners entered upon special jury verdicts in the United States District Court for the Northern District of Ohio, Eastern Division at Civil Action No. 68-162, and remanding for entry of judgment for respondents by the District Court.

OPINIONS BELOW

The United States District Court, by Hon. Robert B. Krupansky, D.J., entered judgments on the jury verdicts, but did not deliver or file an accompanying opinion. The said judgments were filed September 14, 1972. Thereafter, on October 13, 1972, the learned District Judge filed an order denying motions of respondents for a new trial or non obstante veredicto. Notice of appeal to the United States Court of Appeals for the Sixth Circuit was filed November 10, 1972.

In the United States Court of Appeals for the Sixth Circuit at No. 73- 1081 an opinion accompanied the judgment reversing the judgment of the District Court and remanding for entry of judgment for respondents therein. The said opinion is not yet reported, and is appended hereto (App.1).

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on September 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

I. In a diversity suit asserted on West Virginia right of privacy law as well as on Ohio's right of privacy law, where the complained of invasion consisted of the physical, uninvited and unforgiven intrusion by respondents into the private and secluded home of petitioners, none of whom were public officials or public figures, and in the absence of the mother, Margaret Mae Cantrell, the taking of uncomplimentary photographs (50) therein, several of which were thereafter published in a lengthy, illustrated, false and fictionalized Sunday feature story, emotionally distressing and humiliating to petitioners; should a jury verdict in their favor and judgment thereon be voided for lack of specific proof of malice? (Affirmed by Court of Appeals)

Questions Involved (contd.)

II. Is the "general right to privacy" of individuals--the "right to be let alone by other people"--no longer to be "left largely to the law of the individual States" as declared by the Supreme Court in Katz v. United States, 389 U.S.347, 352 ?

III. Is the Seventh Amendment right to trial by jury in civil cases applicable in invasion of privacy cases involving intrusions, trespasses and physical acts other than mere publication of false and fictionalized defamation of private citizens, including infants, other than public officers or public figures ? (Denied below)

IV. Does publication of some of the photographs taken by intrusion and trespass in the private home of petitioners, without invitation and in the absence of the mother and sole surviving parent of seven minors, ranging in age from 17 years to 2 years, wipe out petitioners' West Virginia "protected" right to privacy, unless they can show specific proof of malice? (Affirmed below)

CONSTITUTIONAL PROVISIONS INVOLVED

While the Fourth Amendment right to privacy as against uninvited intrusions and trespasses by the government is not directly involved, (as in the case of Ellsberg) publication of matters obtained by even such trespass would be sufficient to deprive the victim of invasion of privacy of a civil cause of action, failing specific proof of malice in even a false, fictionalized defamation.

The "evolving law of privacy", at least as broad as the Constitution, is here involved and affected by the judgment below.

STATEMENT OF THE CASE

Although a false and fictionalized article was published

in the Cleveland Plain Dealer under a double page banner caption titled "Legacy of the Silver Bridge", on August 4, 1968, which referred back to the fall of the Silver Bridge on the previous December 15th, the entire article of several pages was written as upon a supposed current interview of Margaret Mae Cantrell in her home just prior to the publication. In fact, Mrs. Cantrell was not at the home, was not aware of the uninvited presence of the young, imaginative reporter and photographer, had not consented to their intrusion into the premises or to the taking of some 50 photographs, and had not consented to the publication. The photographs of the Cantrell home and children, ranging in age from two years to 17 years, depicted them as being most pathetic and neglected "hill-billies", whose deceased father "had little to live for" and who, like the other "hill folk" who were killed in the disaster "had wives and children, but that's all they had". Not a single child referred to in the article had been in or near the scene of the newsworthy disaster when it occurred; nor was the article published incidentally to any other newsworthy event focussing public interest anew or specifically on the Cantrells. The home of the plaintiffs was made to appear as a dirty, poverty-stricken shack, lacking any of the most basic comforts and accommodations.

The article was so offensive to the community as to provoke editorial and front-page criticism in a local publication, inter alia. The children were embarassed at school and in public.

The District Judge had sustained motions to dismiss as to the six youngest children on the basis that they were too young to have suffered humiliation or emotional trauma; and rejected the claim for punitive or exemplary damages prior to submitting to the jury the following special verdicts, to which the jury returned the answers presented:

"Special Issue No. 1: Do you find from a preponderance of the evidence that the defendants, Joseph Eszterhas, Richard T. Conway and Forest City Publishing Company, or any combination of said defendants, invaded the privacy of the plaintiffs, or either of them, within the definition or instruction of the Court?

"Answer: Yes.

"If you have answered Special Issue No. 1 yes, and only in that event, then answer the following Special Issue No. 2.

"Special Issue No. 2: Designate the defendants that invaded the privacy of the defendants or either of them.

"Answer: Joseph Eszterhas--yes. Richard T. Conway--yes. Forest City Publishing Company--yes.

"If you have answered Special Issue No. 2 in the affirmative, and only in that event, then answer Special Issue No. 3.

"Special Issue No. 3: Designate the plaintiff (238) or plaintiffs whose privacy was invaded by the acts of the defendant or defendants.

"Answer: Margaret Mae Cantrell--yes. William David Cantrell--yes.

"If you have answered Special Issue No. 3 in the affirmative, and only in that event, then answer Special Issue No. 4.

"Special Issue No. 4: If your answer is affirmative to either one of Special Issues No. 1 and 3, in what amount, if any, measured in dollars and cents, do you find from a preponderance of the evidence that the individual plaintiffs were damaged? State such amount, or none, in the following blank spaces according to your findings.

"Answer: Margaret Mae Cantrell, $45,000, William David Cantrell, $15,000.

"The six jurors must agree on each answer, affirmative or negative, that you give to each of the above special issues.

"Verdict of the jury: We, the jury,have answered the above and foregoing special issues as herein indicated and herewith return the same into court as our verdict. Foreman of the jury, Alfred Lesti."

Members of the jury, is this your verdict?

(239) (The jurors indicate it is their verdict.)"

Upon entry of the verdicts, on September 14, 1972, the District Court entered judgments thereon, and on October 13, 1972 an order was filed denying the defendants' motion for a judgment non obstante veredicto or in the alternative for a new trial. The defendants appealed to the United States Court of Appeals for the Sixth Circuit on November 10, 1972. The Opinion and Judgment of the Court of Appeals reversing the District Court judgment and remanding for entry of judgment for the defendants was filed September 10, 1973. This petition for certiorari was forwarded to the Clerk of this Honorable Court on September 24, 1973, together with a motion for leave to proceed in forma pauperis upon the original record, and the appendices accompanying the brief and reply brief of the defendants in the Court of Appeals.

Federal jurisdiction in the District Court was asserted on the basis of diversity of citizenship and an amount in controversy in excess of Ten Thousand Dollars for each plaintiff, exclusive of interest and costs. Jurisdiction was admitted.

REASONS FOR GRANTING THE WRIT

I. The Questions involved are substantial and require resolution by this Honorable Court; so as to obviate further lower court confusion and conflict arising from decisions herein involving the judicially expanded First Amendment rights of publishers,

in relation to the right of a private person "to be let alone", described by the late and revered Justice Louis D. Brandeis as "the right most valued by civilized men". (1928):

Under the holding of the Sixth Circuit Court of Appeals sought to be reviewed herein, the fact of publication of the article, false, defamatory, humiliating and fictionalized though it be, is sufficient to defeat the right of privacy of petitioners under State laws which privacy had been instrusively invaded without invitation, advance knowledge or ratification, to "set the stage for" the publication.

II. The case is of great importance in the "exranding law of invasion of privacy", in that the decision of the Court of Appeals in effect encourages invasions by intrusion, deception and trick into the private homes of private persons by uninvited and unwanted photographers and reporters whose publisher can now assure them immunity from answerability by merely publishing the purloined, twisted and fictionalized product of their intrusive invasion of such privacy.

III. The decision of the Court of Appeals enlarges the Constitutional rights of publishers beyond the holdings herein and to the point of eliminating the right of privacy of all persons even in their private residences, though they are neither public figures mor involved in or part of any news event or timely matter of public interest.

IV. The decision of the Court of Appeals in effect limits jurisdiction of the federal courts to make judicial inquiry or review, and holds that the judgments of the publishers must control in all cases catalogued by them alone as "newsworthy".

V. The decision of the Court of Appeals wipes out

the right of victims of intrusive invasions of privacy to Seventh Amendment guarantee of trial by jury in civil actions asserted upon prevailing State laws and constitutions protecting such private rights.

VI. The decision of the Court of Appeals ignores the established and accepted authorities such as Dean Prosser whose work on Torts, 3rd ed. p. 832 has been widely approved by our courts, citing the four separate torts involved in an invasion of privacy, such as is involved in the within case, namely: " (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name and likeness"; 62 Am. Jur. 2d, Privacy, par. 1, 26. The Court of Appeals makes no distinction in cases based solely on publications and those involving uninvited physical intrusions into the private, personal homes of private persons, not incidental to any current news or matter of public interest, and resulting in unwanted and humiliating exposure by false, fictionalized and defamatory distortion of the very private home and personal circumstances of the petitioners.

VII. The decision of the Court of Appeals ignores or misconstrues the holdings of Curtis Publishing vs. Butts, 388 U.S.130, 87 S. Ct. 1975; the "penumbral" privacy rights decisions of West Virginia State Board of Education vs. Barnette, 319 U.S., 624, 63 S. Ct. 1178; Stanford vs. State of Texas, 379 U.S. 476, 85 S. Ct. 506; and the "general right to privacy" holding of Katz vs. United States, 389 U.S. 347, inter alia, as well as negativing the State laws of West Virginia and Ohio in the matter of physical intrusion invasion of privacy cases.

VIII. The decision of the Court of Appeals fails to distinguish between the basic essentials of actions of defamation and those of invasion of privacy, holding that malicious untruths in

either form of action must be established affirmatively by a plaintiff at trial; whereas even a truthful but improper exposure of private matters can give rise to an action for invasion of privacy; Time, Inc. vs. Hill, 385 U.S. 374.

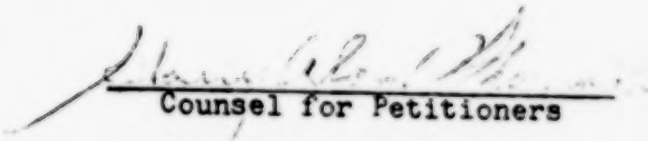
IX. The decision of the Court of Appeals conflicts with the decisions of other Circuit Courts and with the decisions of the Supreme Courts of Ohio and West Virginia; Young vs. That Was the Week That Was, etc., 423 F2d 265; Cordell vs. Detective Publications, 419 F2d 989; Housh vs. Peth, 165 Ohio St. 35; Sutherland vs. Kroger Co., 144 W.Va. 673.

The briefs of petitioners in the Court of Appeals raised all of the foregoing matters either directly or by implication, but failed to prevail therein.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the prayer of this petition be granted.

Respectfully submitted,



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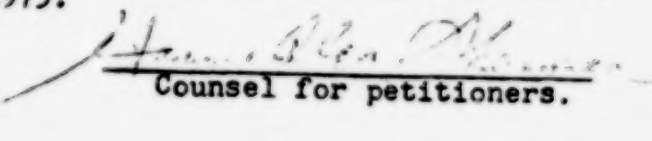
CERTIFICATE OF MAIL SERVICE

I hereby certify that I have served a true copy of the foregoing Petition for Writ of Certiorari upon Smith Warder, Esq., attorney for respondent, by direct mail, postage prepaid, addressed to his office, 1144 Union Commerce Bldg., Cleveland, Ohio 44115, this 24th day of September, 1973.



Counsel for petitioners.

No. 73-1081

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARGARET MAE CANTRELL, ET AL.,
Plaintiffs-Appellees,

v.

FOREST CITY PUBLISHING CO., a corporation, JOSEPH ESZTERHAS, AND RICHARD T. CONWAY,
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed September 10, 1973.

Before: EDWARDS, PECK and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. In this diversity case a jury awarded damages to two private citizens in their action for invasion of privacy against the publisher of The Cleveland Plain Dealer, a reporter and a photographer. At the conclusion of the plaintiffs' case, in response to a motion for a directed verdict on behalf of all the defendants, the District Court found "that there has been no evidence to support the charges that the invasion of privacy, if in fact an invasion of privacy occurred was done maliciously within the legal definition of that term." The Court then ordered stricken all allegations relating to punitive damages, and dismissed as to several infant plaintiffs, but denied the motion for a directed verdict as to the two plaintiffs who are appellees. The issue is whether, having ruled that there was no evidence

that the defendants had acted maliciously "within the legal definition of that term," the District Court should have granted a directed verdict. The defendants renewed their motion at the conclusion of all the evidence and made a timely motion for judgment notwithstanding the verdict or a new trial. All these motions were likewise denied. We reverse.

On December 15, 1967 a bridge across the Ohio River at Point Pleasant, West Virginia collapsed. Among the forty-four persons who lost their lives in this tragic accident was Melvin Aaron Cantrell, the 40-year old father of seven children. The "Silver Bridge disaster," as it was labeled by the press, was page one news throughout the country. The Cleveland Plain Dealer sent the defendant Joseph Eszterhas, a feature writer, to the scene and one of his dispatches which was published a few days later described the funeral of Melvin Cantrell. This story was written in the style of a news feature rather than a purely factual account. It dwelt upon the tragic consequences, rather than the details of the accident itself. The article focused on the condition of the Cantrell family as illustrating these consequences.

In early May 1968 Eszterhas and a Plain Dealer photographer, the defendant Richard T. Conway, returned to the Point Pleasant area to do a follow-up feature. Both newspapermen were off duty and operating free-lance. However, before they left Cleveland one of the editors of the Plain Dealer told them that if they came up with a good story the paper would buy it. After stopping for directions, Eszterhas and Conway went to the home owned by Margaret Cantrell, widow of Melvin, and occupied by her and six children ranging in age from 1 to 16 years. Mrs. Cantrell was not at home and a daughter, Dora, was the oldest child there. During a stay of one to one and one-half hours Conway took 50 pictures and Eszterhas talked with the children. There was little evidence as to whether the reporter and photographer were invited into the house. Dora did not testify, but William David Cantrell who was 13 at the time of the event and 17 at trial time, testified

that he saw the men coming across the field and that the door to the house was open. He said no one asked them in and no one asked them to get out. He also said the door was open because the men were coming. William said he assumed the men were from a newspaper, but didn't ask which one. Neither he nor the other children made any objection to being photographed.

The Sunday Magazine of The Cleveland Plain Dealer for August 4, 1968 carried as its lead feature a story entitled, "Legacy of the Silver Bridge." The story by Eszterhas contained a number of inaccuracies and inferred that Mrs. Cantrell was present in her home when he returned to Point Pleasant in May. Five of Conway's pictures were printed with the story. In these pictures the Cantrell home appeared to be dirty and run down and the children were poorly clothed and untidy. The hopeless poverty of the family was emphasized in the feature. The reporter again used the condition of the Cantrell family to illustrate the consequences of the bridge disaster. In the more dramatic language of the article, "His death is a microcosm of the scar which will remain permanent and stark upon the spirit of the people here."

The assistant Sunday editor and assistant managing editor of the Plain Dealer testified that Eszterhas had a good reputation for accuracy of reporting at the time the 1968 article was published. In fact, he won three press awards for his coverage of the Silver Bridge collapse. Conway testified that the photographs fairly depicted the persons and scenes as he found them at the Cantrell residence. He did not suggest that the children make themselves or the home more tidy before the pictures were taken. Joseph Eszterhas did not testify. There was no evidence that Forest City Publishing Company had knowledge of any of the inaccuracies contained in the article.

The complaint alleged that the privacy of the plaintiffs had been violated by the intrusion of the newsman and photographer, for unreasonable publicity about their private lives

and for falsely presenting their condition and making them objects of pity and ridicule. Mrs. Cantrell brought suit for herself and all of her children, but all plaintiffs except Mrs. Cantrell and one son, William David Cantrell, were dismissed by the Court. The complaint also charged the defendants with "malicious and defamatory libel." As developed by the evidence the intrusion complained of consisted of publication of an article which placed the Cantrell family in a bad light because of its inaccuracies and untruths. This is the way the matter was presented to the jury and there is no complaint on appeal concerning the jury charge. On appeal the appellees attempt to treat the entry of the two defendants into their home without an invitation when only children were present as the intrusion for which damages were justified. However, this was not the theory on which the case was tried in the District Court.

Our search for the controlling principles in effect today begins with *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), a civil libel action. In that case the Supreme Court enunciated a federal rule, required by the Constitution, which denies recovery to a public official for defamatory falsehood concerning his official acts unless he proves actual malice, that is, that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279-280. The Court reasoned that to permit virtually unlimited libel judgment against critics of official conduct for failure to determine the truth of every assertion made would lead to a self-censorship by news media that would be as stifling to the widespread dissemination of information as official censorship. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), the same requirement for recovery was applied to a prosecution for criminal libel based on statements made about public officials. Furthermore, the rule of *New York Times* was extended to cover false statements about anything which might relate to an official's fitness for office, not just his official conduct.

App.

In *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), it was held that the term "public officials," for purposes of the *New York Times* rule, includes all government employees having, or appearing to have "substantial responsibility for or control over the conduct of governmental affairs." *Id.*, at 85. It had been contended that the rule applied only to libel actions by elected officials. The same requirement for recovery has been applied to civil libel actions by candidates for public office, *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971), and to cases where the plaintiff is a "public figure" rather than a public official. *Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, 398 U.S. 6 (1970). In *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), recovery in a civil libel action for a defamatory falsehood contained in a broadcast was denied to a private citizen who was neither a "public official" nor a "public figure" where actual malice as defined in *New York Times* was not proven. The plurality opinion of three members of the Court extended the requirement of a showing of actual malice for recovery to matters of "public or general interest." 403 U.S. at 43. In addition, this opinion required a standard of "clear and convincing proof" that the defamatory falsehood was published with knowledge that it was false or with reckless disregard for its truth or falsity which must be met to sustain a libel action against one within the protection of the First Amendment.

In the course of developing the scope of privilege conferred upon the news media with regard to actions seeking damages for libel and defamation, the Supreme Court was called upon to apply the *New York Times* principles to a case of invasion of privacy. In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), recovery of damages under a New York right of privacy statute was not permitted in the absence of a showing that a false report of a newsworthy event was published either with knowledge of its falsity or in reckless disregard of its truth or falsity.

The case involved an article which appeared in Life magazine in February 1955 and was a highly fictionalized account of an ordeal experienced by the Hill family more than two years earlier when they were held hostage in their home for 19 hours by three escaped convicts. The Hills had moved to a different state and had discouraged all efforts by the media to keep them in the spotlight. The occasion for the article in Life was the opening in New York of a play, based on a novel which had appeared in 1953. Reports of a number of hostage incidents were used as source material by the novelist, and the Hill family was not identified in the novel or the play. The pictures which accompanied the Life article were taken at the former Hill residence where the incident had occurred, with actors portraying events which were quite different from the actual experiences of the Hills. These pictures indicated that the convicts had mistreated the family, whereas Mr. Hill had stated to newsmen immediately after the release of the family that there had been no violence, that no one was molested by their captors and that the family had been treated courteously.

One important difference between *Hill* and the present case is that the opening of the New York play was considered a matter of sufficient public interest to justify bringing the actual incident back into the news. 385 U.S. at 388. There is no evidence of any activity related to the "Silver Bridge disaster" which would have naturally rekindled public interest in the event. Nevertheless, the article complained of appeared less than nine months after the event and we believe the "journalistic judgment" of a newspaper publisher (Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, — U.S. — (41 U.S. Law Week 4688, May 29, 1973)) cannot be circumscribed by linking newsworthiness solely to the passage of time.

In their briefs the appellees seek to differentiate *Time, Inc.* v. *Hill, supra*, on the further ground that there was no physical intrusion by representative of Life, whereas Eszterhas

and Conway did intrude into the Cantrell home. The two newsmen may have been guilty of a trespass against the property of the Cantrells. However, the gravamen of this action lies in the claim that the publication of the article, not the physical intrusion, damaged the plaintiffs. Appellees cite *Dietemann* v. *Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), for the proposition that the physical intrusion into their home is sufficient invasion of privacy to sustain the judgment. In *Dietemann* two reporters gained entrance to the home of the plaintiff by subterfuge, and took pictures with a hidden camera and recorded conversations by means of a hidden microphone. The Court held that the later publication of some of the pictures and printed matter based on the recordings did not immunize the publisher from responding in damages for the intrusion. The Court found that the invasion of privacy consisted of the clandestine photography and recording and that "publication is not an essential element of plaintiff's cause of action." 449 F.2d at 249. In her testimony Mrs. Cantrell claimed no injury from the entry of the two defendants on her premises, but testified that the article made her mad and upset her because of all the untruths it contained. On cross-examination she said that she objected to the Plain Dealer article for what it said, not because of the publicity. Here publication was clearly an essential element of the cause of action.

In *Varnish* v. *Best Medium Publishing Co.*, 405 F.2d 608 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969), relied upon by plaintiffs, the Court specifically found that the evidence of invasion of privacy was sufficient to establish that an article containing falsehoods was published with knowledge of its falsity or in reckless disregard for truth. In the present case the District Judge made a finding that there was no evidence to support the claim that an invasion of privacy was done maliciously "within the legal definition of that term." A finding of actual malice as defined in *New York Times*, is not required only for punitive damages, but is necessary also to

support an award of compensatory damages. Having correctly determined that there was no evidence of known falsity or reckless disregard of the truth, the District Court should have granted the motion for a directed verdict as to all defendants.

There is an unavoidable conflict between the desire of most individuals for anonymity and privacy and the right of the people to enjoy a free flow of information guaranteed by the freedom of press provision of the First Amendment. There is no explicit guarantee of the right of privacy in the Constitution, nor was an action for its violation known at common law. The advent of this action has been traced by most commentators to an article, *The Right of Privacy*, by Warren and Brandeis which appeared in the Harvard Law Review in 1890 (4 Harv. L. Rev. 193). Though this article provides the rationale for recognition of the right, developments over the years have led to fundamental departures from the ideas expressed in it.

A legally protected right of privacy has been declared to exist in most American jurisdictions, including Ohio and West Virginia. See Prosser, *Privacy*, 48 Calif. L. Rev. 383. The Restatement of Torts also recognizes the concept:

> The right of privacy is invaded when there is:
>
> a) An unreasonable intrusion of one's seclusion, or
> b) An appropriation of the other's name or likeness, or
> c) Unreasonable publicity given to one's private life, or
> d) "Publicity which unreasonably places the other in a false light before the public . . . ."
>
> Restatement 2d, Torts, § 652A.

Dean Prosser has written that the Restatement actually describes the invasion of four different interests and that four separate torts are included in the right of privacy, having in common an interference with the right "to be let alone." Prosser, *op cit.* at 389.

In dealing with privacy cases it is important that a court recognize and treat differently the various wrongs which are

included in the general concept of invasion of privacy. With reference to the classifications of the right of privacy set forth in the Restatement and Prosser, the action of the Cantrells was tried as one for publicity which unreasonably places a person in a false light before the public. *Time, Inc.* v. *Hill, supra*, was concerned with a New York statute which forbade the appropriation of a person's name or a likeness for pro[illegible]. On appeal, it was presented as a "false light" case, since it was agreed that the right of the plaintiffs to recover depended on proof that the account of their experience was fictionalized. Since falsity was an element of the wrong, the Court applied the rule from *New York Times* v. *Sullivan, supra*. Since the present case was tried under the same theory as to the type of invasion of privacy complained of, we have sought to apply the rule of *Time, Inc.* v. *Hill, supra*.

While the Constitution does not explicitly guarantee the right of privacy, the Supreme Court has held that such a right does exist and is protected by various provisions of the Bill of Rights. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). When an invasion of privacy involves publication, the First Amendment must be considered and a mere balancing of rights will not suffice. If there are preferred positions among the rights guaranteed by the Bill of Rights, certainly such priority attaches to freedom of speech and the press rather than to the less explicit and less well defined right of privacy. See Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 Columbia L. Rev. 693. When the particular invasion of privacy complained of consists of publicity which places the plaintiff in a false light in the public eye, and the publication meets a reasonable standard of newsworthiness, then an action may be sustained only if actual malice as defined in *New York Times* v. *Sullivan, supra*, is established.

Our holding does not mean that a private citizen who involuntarily becomes newsworthy in the judgment of a publisher will forever remain a fair subject of publicity. In two cases decided forty years apart, *Melvin* v. *Reid*, 112 Cal. App.

285, 297 P. 91 (1931), and *Briscoe* v. *Reader's Digest Association*, 483 P. 2d 34 (Calif. 1971), the Supreme Court of California dealt with situations where publications which were essentially truthful were held to constitute an invasion of privacy because the passage of time had rendered the subjects of the articles no longer newsworthy. In each case criminal activities which had occurred many years earlier were publicized and the person revealed to have committed them was at the time of the publication an accepted member of society who had made a clean break with the past. In *Briscoe* the California Court held that a person who was formerly in the news, after a period of time, was entitled to the "expectation of anonymity regained." 483 P.2d at 41. These cases correctly establish a rule that there is no absolute immunity from damages for publishing truthful matters about essentially private persons long after their connection with newsworthy events has ceased to exist. This is particularly true when the matter made public is offensive according to the standards of reasonable men.

On the other hand, despite vigorous efforts to avoid publicity, some people remain newsworthy because of circumstances which arouse a legitimate interest in their lives. In *Sidis* v. *F-R Publishing Corporation*, 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1941), this was held to be true in the case of a child prodigy who had made every effort for 25 years to avoid publicity and for whom the results of later publicity were disastrous. The judgment of what is newsworthy must remain primarily a function of the publisher. However, in cases where essentially private persons are the subject of publicity because of their involuntary connection with events of widespread interest, this discretion or judgment of the publisher cannot be absolute. The curiosity and voracious appetite of the public for scandal would be too easily exploited by unscrupulous publishers. The right of the public to know is clearly one of the primary values protected by the First Amendment and its ". . . guarantees are not for the

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benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill, supra* at 389. No test has been authoritatively formulated (see Bloustein, *Privacy, Tort Law and the Constitution*, 46 Texas L. Rev. 611, 626 for a thoughtful suggestion) for judicial review of "newsworthiness" in these cases. Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher. This is not such a case.

In *Rosenbloom v. Metromedia*, Justice Brennan writing for the Supreme Court stated the problem and the American answer to it as follows:

> We are aware that the press has, on occasion, grossly abused the freedom it is given by the Constitution. All must deplore such excesses. In an ideal world, the responsibility of the press would match the freedom and public trust given it. But from the earliest days of our history, this free society, dependent as it is for its survival upon a vigorous free press, has tolerated some abuse. In 1799, James Madison made the point in quoting (and adopting) John Marshall's answer to Talleyrand's complaints about American newspapers, American State Papers, 2 Foreign Relations 196 (U.S. Cong. 1832):
>
> > "'Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness*, is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from*

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> *the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.'"* 6 Writings of James Madison, 1790-1802, p. 336 (G. Hunt ed. 1906) (emphasis in original). 403 U.S. at 51.

Although Mrs. Cantrell and her son were displeased with the article published by the Plain Dealer and the article was not as carefully written as it should have been, nevertheless there was no proof that the Forest City Publishing Company printed and distributed the article with any knowledge of the falsities contained in it or in reckless disregard of whether or not it was true. Absent a calculated falsehood, the publication or broadcast of material concerning an event of public interest may not result in the imposition of a judgment for damages because of falsehoods or distortions arising from negligence or poor reporting. The failure of the defendant Forest City Publishing Company to verify the factual assertions in the story is not condoned, but there was no evidence of calculated falsehood. See *St. Amant* v. *Thompson*, 390 U.S. 728, 733 (1968).

The judgment of the District Court is reversed and the case remanded for entry of judgment for the defendants.

App.

Supreme Court, U. S.
FILED
AUG 14 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

No. 73-5520

MARGARET MAE CANTRELL ET AL., PETITIONERS

v.

FOREST CITY PUBLISHING CO., A CORPORATION, JOSEPH ESZTERHAS AND RICHARD T. CONWAY, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for certiorari filed September 26, 1973
Certiorari granted July 8, 1974

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Civil Action No. C69-162

In the United States District Court

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

MARGARET MAE CANTRELL, *et al.*,

Plaintiffs,

vs.

FOREST CITY PUBLISHING COMPANY, *et al.*,

Defendants.

RELEVANT DOCKET ENTRIES

3/4/69	Complaint filed. Summons issued. 3 copies of each to Marshal.
4/18/69	Answer of defendants filed. Copy mailed 4/18/69.
4/30/69	Amended Answer of the Defendants filed. Copy mailed 4/30/69.
9/11/72	Minutes of proceedings filed. Trial to jury begun; adj. to 10:00 a.m. tomorrow, Krupansky, J. Thompson, R.
9/12/72	Minutes of proceedings filed. Trial to jury resumed; adj. to 10:00 a.m. tomorrow, Krupansky, J. Pavolino, R.
9/13/72	Minutes of proceedings filed. Trial to jury resumed; adj. to 9:30 a.m. tomorrow, Krupansky, J. Pavolino, R.
9/13/72	Order that motion of Defts for directed verdict as to Pltfs., Lolita Sue Cantrell, Dora Dean Cantrell, Juanita Lee Cantrell, Terry Franklin

Cantrell, Nancy Lynn Cantrell & Keith Elmer Cantrell, minors by Margaret Mae Cantrell, mother & natural guardian is hereby granted; complaint is dismissed as to the above Pltfs filed. Krupansky, J. Copies to Sherman, Klein & Warder. [This Order File-Stamped October 12, 1972.]

9/11/72 Minutes of proceedings filed. Trial to jury resumed & concluded; jury deliberations begun & concluded; verdict for pltf. Margaret Mae Cantrell in sum of $45,000; verdict for pltf. Wm. David Cantrell in sum of $15,000, Krupansky, J. Pavolino, R.

9/14/72 Verdict filed.

9/14/72 Judgment that pltf. Margaret Mae Cantrell recover from defts. sum of $45,000.00 and that pltf. Wm. David Cantrell recover from defts. sum of $15,000.00; and costs filed, Kupansky, J. Copies to Sherman, Klein and Warder.

9/18/72 Motion of Defts for Judgment, N.O.V., & alternative motion for a New Trial with Brief in support of Motion filed. Copy mailed 9/18/72.

9/25/72 Motion of Pltf to set aside directed Verdict and motion for a new trial as to minors & as to punitive damages filed. Copy mailed 9/22/72.

10/13/72 Order denying Motion for a new trial as to minors & as to punitive damages; further ordered that Motion of Deft for Judgment, N.O.V. & alternative motion for a new trial is denied filed. Krupansky, J. Copies to Sherman, Klein & Warder

11/10/72 Notice of Appeal by Defts filed. Copies by Clerk to Sherman, Warder & Klein

11/21/72 Bond for costs on Appeal filed.

11/21/72 Supersedeas bond filed. $500.00. (Federal Insurance Co.)

12/12/72 Order granting the time for filing the certified record on appeal for an extension until 1/19/73 to enable the Court Reporter to complete the transcript of Proceedings filed. Krupansky, J. Copies to Court Reporter, Sherman, Klein & Warder

1/16/73 Order granting the time for filing the certified record on appeal to 2/7/73 to enable the Court Reporter to complete the transcript of Proceedings filed. Krupansky, J. Copies to Court Reporter, Sherman, Klein & Warder

1/19/73 Transcript of Proceedings before Krupansky, J. commencing on 9/12/72 filed. Pavolino, R.

1/19/73 Certified Original Pleadings mailed to the Clerk for the Court of Appeals for the Sixth Circuit.

COMPLAINT

(Filed March 4, 1969)

Plaintiffs, by their attorneys, bring this suit against the defendants above named upon the following cause of action:

(1) Jurisdiction is based on diversity of citizenship of the parties, an amount in controversy in excess of ten thousand ($10,000) Dollars exclusive of interest and costs, and the rights of privacy of plaintiffs under the Constitution of the United States.

(2) Plaintiff Margaret Mae Cantrell, is the widow of Melvin Aaron Cantrell, deceased, and the mother of the minor plaintiffs, Lolita Sue Cantrell, aged 17 years; Dora

Dean Cantrell, aged 15 years; William David Cantrell, aged 14 years; Juanita Lee Cantrell, aged 12 years; Terry Franklin Cantrell, aged 9 years; Nancy Lynn Cantrell, aged 5 years; and Keith Elmer Cantrell, aged 2 years. All of the said plaintiffs reside together and are citizens of West Virginia, residing in Gallipolis Ferry therein.

(3) Forest City Publishing Company is an Ohio corporation, as plaintiffs are informed, and believe, having its principal office and plant in the City of Cleveland, Ohio, and being a corporate citizen of the State of Ohio. Said defendant is publisher of the Plain Dealer.

(4) The individual defendants, Joseph Eszterhas and Richard T. Conway, are employees of the corporate defendant and are citizens and residents of Ohio.

(5) At all times pertinent, plaintiffs were private citizens of good name and repute, entitled to their constitutionally protected right of privacy, individually and as a family.

(6) On or about the 4th day of August, 1968, defendants did intentionally and knowingly publish a malicious and defamatory libel of and concerning plaintiffs and their home and family, as well as of Melvin Aaron Cantrell, deceased, in the form of a five-page article and photographs, which said defamatory publication said defendants did maliciously and wantonly publish throughout Ohio and West Virginia, inter alia, as will be determined from the postal and distributing records of defendants. The said publication, a copy of which is hereto annexed, maliciously, falsely, wantonly and scandalously portrays plaintiffs' decedent as a "statistic" who had "little to live for", who was, together with his family, ignorant, and a drunk; and which depicts plaintiffs as "hillbillies" who are unclean, backward, drab and unfeeling.

(7) The said libel was prominently published in a magazine section of a Sunday edition of the Plain Dealer, and was intended to be and in fact was read by the general public, as if the contents thereof were truthful, when in fact they contained gross error, misrepresentation, falsehood and bias, intentionally and knowingly inserted for the sole purpose of fictionalizing and dramatizing the article to encourage reading thereof by the curious, gullible and insensitive, and to boost the circulation and profit of defendants.

(8) The aforesaid libel was unprivileged and malicious and was published without the consent of plaintiffs.

(9) Defendants at no time had any reasonable or justifiable grounds for believing the libelous writing to be true.

(10) Defendants at no time had reason to believe that the libelous writing was fair, true or just, or based upon proper facts; but on the contrary, defendants knew that it contained false and completely untrue statements, and was written and published for the purpose and with the effect of injuring the reputation of the decedent and of plaintiffs, as well as of their family and home.

(11) Plaintiffs are advised and believe that the evil purpose of the libelous writing and publication is to belittle the value of the life of plaintiffs' decedent, and to influence prospective jurors being readers thereof in pending litigation for the deaths of victims of the "Silver Bridge Disaster" at Point Pleasant, West Virginia, contrary to the rights of estates and survivors interested therein, as well as of plaintiffs.

(12) The publication of the distorted facts, in the evil and biased manner as aforesaid, was consequent to the

unwarranted trespass by defendants, through and by the individual defendants, on the property and rights of plaintiffs, without plaintiffs' consent, and in deliberate and scornful disregard of the rights of plaintiffs to security of their persons, family and home, and their precious right of privacy.

(13) The writing and publication complained of unwarrantedly exposed plaintiffs to public view, shame, humiliation, contempt, ridicule and embarrassment; and plaintiffs have been and will be injured in their feelings, and will be caused great mental suffering.

(14) The unwarranted trespass upon the personal, proprietary and constitutional rights of the plaintiffs as aforesaid, have and will continue to unjustly violate the integrity of the persons, the honor, the reputations and the sensibilities of plaintiffs.

(15) The libelous publication, unwarrantedly depriving plaintiffs of their rights of privacy as aforesaid, is beyond the limits of decency, and degrades plaintiffs for the profit of defendants.

(16) By reason of the libelous writing and publication as aforesaid, the inalienable rights of plaintiffs to enjoyment of their lives, their home, their family, and their privacy have been offended in such manner as to outrage them as persons of ordinary sensibilities.

(17) The libelous writing and unwarranted deprivation of plaintiffs' rights as aforesaid, scandalously and maliciously done, have and will damage the reputations, sensitivities and character of plaintiffs, and have and will oppress and subject them to great embarrassment and humiliation, all to their damage and hurt.

WHEREFORE, plaintiffs demand of defendants damages in the sum of ONE MILLION DOLLARS ($1,000,000), and a like and equal sum as punitive damages.

A jury trial is demanded.

/s/ Harry Alan Sherman
Austin T. Klein
Attorneys for Plaintiffs

AMENDED ANSWER

(Filed April 30, 1969)

1. Come now defendants, Forest City Publishing Company, Joseph Eszterhas, and Richard T. Conway, and twenty days not having expired since the filing of their original answer, for their amended answer to the complaint deny the allegations contained in Paragraph 1 thereof.

2. These defendants admit the allegations contained in Paragraphs 2, 3, and 4 of the complaint.

3. These defendants deny the legal conclusions averred in Paragraph 5 of the complaint.

4. Answering Paragraphs 6 and 7 of the complaint, these defendants admit the publication of the article attached to the complaint and intended to be referred to in said paragraphs and deny the further averments contained in said Paragraphs 6 and 7.

5. Further answering, these defendants deny the allegations contained in the remaining paragraphs of the complaint and deny that plaintiffs have been damaged in any sum whatever.

FIRST SEPARATE DEFENSE

6. For their first separate defense, defendants repeat and reaver the allegations, admissions, and denials foregoing to the same force and effect as though fully rewritten herein and further say that at the time of said publication defendants did and do now believe that the matters set forth therein, were true.

SECOND SEPARATE DEFENSE

7. For their second separate defense, defendants repeat and reaver the allegations, admissions, and denials foregoing to the same force and effect as though fully rewritten herein and further say that plaintiffs herein were newsworthy and public figures, both because of their tragedy in connection with the collapse of the Silver Bridge and because of the filing of their lawsuit, referred to in Paragraph 11 of the complaint. Defendants say that such statements as they published were published without actual malice and accordingly are protected by the First and Fourteenth Amendments of the United States Constitution.

THIRD SEPARATE DEFENSE

8. For their third separate defense, defendants repeat and reaver the allegations, admissions, and denials foregoing to the same force and effect as though fully rewritten herein and further say that all of the statements made by defendants or any of them with respect to plaintiffs or any of them are privileged in that they were made without malice and in that they did not exceed the bounds of fair comment.

FOURTH SEPARATE DEFENSE

9. For their fourth separate defense, defendants repeat and reaver the allegations, admissions, and denials

foregoing to the same force and effect as though fully rewritten herein and further say that at the time of the publication complained of defendants believed and do believe that the matters contained in said article were in all respects an accurate report of the things and matters therein set forth and that such matters were published by defendant in the honest belief that they were true. Defendants say that such matters were of great public interest in the communities wherein the newspaper, The Cleveland Plain Dealer, is circulated. These defendants further say that such matters were in all respects based upon information and reports which were received by defendant from reliable and trustworthy sources in the regular and usual course of their business, and that such publication was made without malice toward plaintiffs or towards anyone and in good faith and in reliance upon the truth and accuracy of the information and reports.

FIFTH SEPARATE DEFENSE

10. For their fifth separate defense, these defendants repeat and reaver the allegations, admissions, and denials foregoing to the same force and effect as though fully rewritten herein and further say that the publication and article complained of constituted an accurate report to the public concerning a matter of great public interest and concern and as to which these defendants have the right and the duty to keep the public informed.

WHEREFORE, having fully answered, defendants pray that the complaint be dismissed and that they and each of them may go hence without day.

/s/ Smith Warder

TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HON. ROBERT B. KRUPANSKY, JUDGE OF SAID COURT, COMMENCING ON TUESDAY, SEPTEMBER 12, 1972.

APPEARANCES:

On behalf of the Plaintiffs:

Harry A. Sherman, Esq.
Austin T. Klein, Esq.

On behalf of the Defendants:

Arter & Hadden, by
Smith Warder, Esq.

[3] Tuesday, September 12, 1972, 9:30 A.M.

The Court: Are we prepared to proceed, gentlemen?
Mr. Sherman: We are, your Honor.
Mr. Smith: We are.
The Court: Call the jury in.
(Thereupon, the jurors take their places in the jury box.)
The Court: Good morning.
You may proceed, Mr. Sherman.
Mr. Sherman: Mrs. Cantrell, would you please come forward and be sworn?

[4] **Margaret Mae Cantrell**, a plaintiff herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF MARGARET MAE CANTRELL

By Mr. Sherman:

Q. Mrs. Cantrell, will you please keep your voice up, and tell the Court and members of the jury your full name? A. Margaret Mae Cantrell.

Q. Keep your voice up a little more, please. Mrs. Cantrell, what is your home residence? A. Gallipolis Ferry, West Virginia.

Q. And are you married or single? A. I am a widow.

Q. You are the widow of Melvin Aaron Cantrell? A. Yes, sir.

Q. Mrs. Cantrell, where were you born? A. Mason County, West Virginia.

Q. And is that where Point Pleasant is? A. Yes, sir.

Q. Now, just to get our geography a little better fixed in the jury's minds, as relates to Ohio, where is Point Pleasant? A. It's across the Ohio River from Kanauga.

[5] Q. Kanauga, which is just above Gallipolis? A. Yes, sir.

Q. Then where is Gallipolis Ferry? A. It's 6 miles south of Point Pleasant.

Q. On the West Virginia side? A. On the West Virginia side.

Q. Just across the river. You would go down Route 2 in West Virginia, which is along the river, and you would come to Gallipolis Ferry, is that right? A. Yes, sir.

Q. All right. Now, how long have you lived in Gallipolis Ferry, West Virginia? A. About 15 years.

Q. And when were you married to Mr. Cantrell? A. 1949.

Q. And how many children do you have? A. Seven.

Q. Would you please tell the jury the names and the ages from the oldest to the youngest? A. Lolita Sue, 21; Dora, 19; William David, 17; Juanita Lee, 16; Terry Franklin, 13; Nancy Lynne, 9; and Terry Franklin, 6.

Q. Keith? A. Keith, I mean. I'm sorry.

[6] Q. That's the baby, right? A. The baby.

Q. Terry is how old? A. 13.

Q. All right. Now, are any of your children that are at home with you not going to school? A. No, they are all going to school this year.

Q. And the oldest child, the 21-year-old child, is she at home? A. She's married.

Q. And not living at home, is that right? A. No.

Q. How long has she been married? A. Three years.

Q. Where were the children born? A. They were all born in Mason County.

Q. West Virginia, right? A. West Virginia.

Q. What was the name of your parents? A. William and Francis Garvin.

Q. I'm sorry, the way I asked the questions—*was* the name. Your mother is here, isn't she? A. Yes, sir.

Q. And her name is Francis Garvin, G-a-r-v-i-n? [7] A. Her name is Francis Kerns now.

Q. Right. K-e-r-n-s, right? A. Yes, sir.

Q. Where were they born? A. Mason County.

Q. Your grandparents, where were they born? A. Mason County.

Q. So as long as you know in your family for generations, you are West Virginians, is that right? A. Yes, sir.

Q. Now, as far as your late husband is concerned, do you know whether that is equally true about him and his parents? A. He was born in Kanawha County.

Q. K-a-n-a-w-h-a? A. West Virginia.

Q. And the Kanawha River comes into the Ohio River at Henderson, West Virginia, which is just across the Kanawha River from Point Pleasant, isn't it? A. Yes, sir.

Q. Now, the home where your residence is, how much land do you have there? A. 74 acres.

Q. Now, this 74 acres that your home is on, who owns that? [8] A. I do.

Q. And before your husband's death, was he joint owner with you? A. Yes, sir.

Q. And how long have you owned that 74 acres? A. Five years.

Q. Now, the death of your husband occurred December 14, 1967; is that right? A. Yes, sir.

Q. So it was just shortly before his death that you became owners? A. We bought it in 1966.

Q. All right. Now, aside from your home, is there anything else built on your land? A. We have a barn and a chicken house and a wash house.

Q. All right. And is there any other person or any other family residing on that 74 acres? A. No, sir.

Q. Now, how close is your farm and residence to Route 2, the main road going down along the river? A. Just around 7 miles.

Q. And that would be east, going east?

The Court: Gentlemen, will you approach the bench, please?

[9] Conference was had at the bench.)

By Mr. Sherman:

Q. Mrs. Cantrell, now keep your voice up so that we can get what you are saying all the way back here, please. Now, this land that you are referring to 7 miles east of Route 2, is there a road, a paved hard road that gets to your land? A. There's about a quarter of a mile that is not paved.

Q. After you get out to where your land is, is that what you mean? A. Yes, sir.

Q. But from Route 2 to the entrance to your land, is that a paved road? A. Yes, sir.

Q. Do you have an automobile? A. Yes, sir.

Q. And presently, what kind of an automobile do you have? A. 1967 Ford Custom.

Q. Do you drive? A. Yes, sir.

Q. Does anybody else drive in your family? A. My oldest son.

Q. His name is? A. David. William David.

[10] Q. William David. Now, with respect to your husband's last day, where was he just before his death? A. You mean my husband?

Q. Yes. A. He was in a 1959 Rambler station wagon on the passenger side and we were on the—

Q. Where were you at that time? A. I was in the driver's seat.

Q. And was there somebody else in the car? A. Yes, Mr. Cecil Counts.

Q. Where were you in the car—I mean where was the car? A. We were on the Silver Bridge.

Q. Now, this Silver Bridge was a structure that crossed from Kanauga to Point Pleasant, is that right? A. Yes, sir.

Q. You were heading west? A. We were heading to Ohio.

Q. From— A. From Point Pleasant.

Q. Then, of course, there was this collapse of the bridge, wasn't there? A. Yes, sir.

Q. There were a large number of vehicles and trucks and **[11]** cars on the bridge? A. As far as I could see, there were cars.

Q. Ahead of yours? A. Ahead and behind.

Q. All right. Now, was your car over land or over water? A. It was over land.

Q. Which land? A. The Ohio side.

Q. And when the bridge collapsed and came crashing down, what happened to your car? A. It landed on land.

Q. On the Ohio side? A. On the Ohio side.

Q. Now, what happened to the two gentlemen in the car, Mr. Counts and your husband? A. The fall killed both of them.

Q. And what happened to you? A. I went to the hospital for shock.

Q. Were you unconscious? A. I don't remember being unconscious.

Q. Do you remember seeing where your car was after the fall? A. Yes, sir.

Q. And was it anywhere near the water? **[12]** A. No, sir.

Q. Now, with respect to your personal injuries and so forth, we are not concerned with that. After you got out of the hospital, you went back home to Gallipolis Ferry, is that right? A. Yes, sir.

Q. And of course, your husband was buried? A. Yes, sir.

Q. Where? A. In the Suncrest Cemetery.

Q. Where is that? A. In Point Pleasant.

Q. In Point Pleasant? A. Yes, sir.

Q. In the Suncrest Cemetery? A. Yes, sir.

Q. Have you visited the grave? A. Yes, sir.

Q. And the family, has it visited the grave? A. Yes, sir.

Q. Have you noticed the graves around where his grave is? A. Yes, sir.

Q. Do you know some of the names of the people on tombstones immediately adjacent to where your husband **[13]** is buried? A. No, sir, I don't.

Q. Now, Mrs. Cantrell, are you working? A. No, sir.

Q. At any time since your husband's death, were you working? A. Yes, sir.

Q. Where? A. At Dairy Land in Point Pleasant.

Q. Were any of the children working? A. No, sir.

Q. They continued going to school? A. Yes, sir.

Q. Now, on August 8, 1968, it is admitted that there was a publication of an article in the Sunday edition of the Cleveland Plain Dealer which is titled, "Legacy of the Silver Bridge," words by Joseph Eszterhas, photographs by Richard T. Conway. How did you first come to know that there was such an article printed? A. I received it through the mail.

Q. Had you read the Cleveland Plain Dealer before that? A. No, sir.

Q. Did you only receive one copy? Do you know whether [14] other people received copies?

Mr. Warder: Objection, your Honor.

The Court: Approach the bench, gentlemen.

(The following proceedings were had out of the hearing of the jury.)

The Court: Yes, Mr. Warder?

Mr. Warder: He asked the second question before he let her answer the first one. That's the only ground. I wanted to hear the answer.

Mr. Sherman: Maybe you are right.

The Court: All right. Rephrase the question.

(The foregoing proceedings were had out of the hearing of the jury.)

The Court: Objection sustained.

By Mr. Sherman:

Q. Mrs. Cantrell, I'm sorry I asked you two questions at one time. Would you please tell us whether this was the only way that you had of knowing of this article, [15] because you received it in the mail, or was it brought to your attention in other ways? A. After I received it in the mail, it was brought to my attention everywhere I turned in Point Pleasant, Gallipolis Ferry.

Q. Now, did you read the article? A. Yes, sir.

Q. And did you know that there was going to be an article? A. No, I didn't.

Q. Did anyone ever talk with you and say, "Mrs. Cantrell, we would like to have a story from you for the newspaper"? A. No, sir.

Q. Did anyone ever call you or write to you and say, "We consider you as a subject for a story"? A. No, sir.

Q. Did anybody ask you, "May we come down and visit you about a story?" A. No, sir.

Q. To your knowledge, before the publication itself, did anyone tell you that the Cleveland Plain Dealer had sent anybody to your premises? A. No, sir.

[16] Q. When you learned that two men had been to your house—or did you learn that from your children? A. Yes, sir.

Q. And at that time was there any indication as to who these two men were? Did they leave a card or did they leave any other identification? A. No, sir.

Q. Did any of the children know their names or who they were from? A. No, sir.

Mr. Sherman: If your Honor please, I have marked as Plaintiffs' Exhibit 1 the complete article, and I would like to give each member of the jury a copy, after we offer it in evidence, and a copy to your Honor.

The Court: Mr. Warder?

You may offer it at this time.

Mr. Sherman: I offer in evidence Plaintiffs' Exhibit 1.

The Court: It may be admitted.

You don't have to mark each one of them.

Mr. Sherman: I'm sorry, I don't have one for the alternate juror.

The Court: Here, the alternate juror [17] may have mine.

By Mr. Sherman:

Q. Now, Mrs. Cantrell, on the first page of the story there is a photograph of "Bruiser." Who is called Bruiser in your family? A. Keith.

Q. The baby, is that right? A. The baby.

Q. The article starts: "Statistically, Mel Cantrell was just one of 44 bodies. Like all the others, he was crushed beneath the tons of concrete and steel shoved deep into the silt at the bottom of the Ohio River." Is that true? A. No, it isn't.

Q. Was he ever, or his body ever into the Ohio River? A. No, sir.

Q. Were you at home when this reporter and the photographer were at your home? A. No, sir.

Q. Had you ever come in at any time at all to see them? A. No, sir.

Q. Did they talk to you on the telephone that day? A. No, sir.

Q. Did they talk to you on the telephone at any time about [18] anything that is in this article? A. No, sir.

Q. Did you communicate with anyone else for them to give them any information? A. No. I don't remember. I don't think I did.

Q. This article says: "His wife"—of course, there was only one wife that Mel Cantrell had and that was you, right? A. Right.

Q. "His wife remembers him singing along with a Platt and Scruggs song." Did you tell anybody that you remembered him singing a song, a Platt and Scruggs song? A. I never heard him sing in my life.

Q. Did you ever tell anybody that he was singing that kind of a song? A. No, sir.

Q. Do you know what a Platt and Scruggs song is? A. Yes, sir.

Q. What is it? A. Country music. Western music.

Q. All right. Now, the next paragraph says: "A few days after Mel Cantrell"—Incidentally, was your husband known by the [19] neighbors or by the family or by anybody else by just Mel? A. No, sir.

Q. What did they call him? A. Most people that knew him well called him Speedy.

Q. All right. "A few days after Mel Cantrell was pushed beneath the water, a derrick came and lifted him from the silt, depositing him, still inside his Chevrolet, onto a barge." Is that a fact? A. It is not.

Q. "The barge went to shore and some of the people from the funeral homes opened the car door and put him in a black bag stretcher."

The Court: Gentlemen, approach the bench, please.

(The following proceedings were had out of the hearing of the jury.)

The Court: How do you claim this is material?

Mr. Sherman: Your Honor, the story that is fictionalized, under the Varnish case, which is exactly in point, is not news and is [20] not editorial comment and is not covered by privilege.

The Court: As it relates to the people involved in this lawsuit?

Mr. Sherman: Yes, your Honor. And the story—

The Court: So long as it relates to the people in the lawsuit, fine.

Mr. Sherman: Yes.

The Court: But we aren't going to get into the other aspects of the story. I have ruled on that point.

Mr. Sherman: No, no. I am not saying as to Mel Cantrell but the facts as they relate to these people. You see, the whole theme of the story—

The Court: Mr. Sherman, I have ruled on that.

Mr. Sherman: You said the whole article was admitted.

The Court: The whole article is admitted for the purpose of conveying the context of the article to the jury.

Mr. Sherman: Yes.

[21] The Court: The only relative parts of the article as relates to this lawsuit are those that deal with the plaintiffs here, period.

Mr. Sherman: Your Honor, I think that this particular reference here indicates that they got the information from her. You see, they start quoting her—she remembers him, and so forth.

The Court: All right, fine. I have ruled on it and let's proceed accordingly.

You may take your exception.

Mr. Warder: May I be heard, your Honor?

The Court: Yes.

Mr. Warder: I have not been objecting to this because I thought, to quote Mr. Sherman, you can't change a libel case to a privacy case merely by changing the name, and that is why I have not been objecting to let him demonstrate that he is trying a libel case.

The Court: We are trying an invasion of privacy action as it relates to the invasion of the privacy of Mrs. Cantrell as an individual and the four minor plaintiffs.

Mr. Sherman: All right. I am going to skip sections of this and go to the paragraphs [22] involved.

The Court: Thank you.

Mr. Sherman: Your Honor, I apologize for not understanding, really.

The Court: That's all right.

Mr. Sherman: I was going to go through the article just on those points where I thought it was true or untrue.

All right, I've got your ruling. Thank you very much.

The Court: Fine.

(The foregoing proceedings were out of the hearing of the jury.)

The Court: Perhaps, Mr. Sherman, before you continue with your direct examination of Mrs. Cantrell, it would be helpful to the jury if we permitted time for them to read the entire article.

Mr. Sherman: O.K.

The Court: And then you will be permitted to proceed.

Members of the jury, please read the entire article, and when all of you have completed [23] reading it, kindly indicate.

Mr. Sherman: Thank you, your Honor.

(Thereupon, there was a long pause while the jurors read the article as directed.)

By Mr. Sherman:

Q. Now, Mrs. Cantrell, at the time that this picture of Keith was taken, did he have clean clothes? A. Yes, he did.

Q. And was there any need for any shoes to be donated or anything like that for him? A. No, sir.

Q. Now, the article says, "The Silver Bridge killed people who had little to live for and had little they owned. They lived here, had wives and children, and that's all they had." Was your husband close with the family? A. Yes, sir.

Q. Was there love in the family? A. Yes, sir.

Q. Was there any feeling that you had nothing to live for? A. No, sir.

Q. Now, as far as the floor in your house being dirty, was it always dirty? A. No, sir.

[24] Q. As a matter of fact, did you have any paved walk up to your house at that time? A. No, sir.

Q. And would some of that dirt come in when some of the kids brought it in on their feet? A. Yes, sir.

Q. Now, with respect to page 11, there is a reference here to an Adore. Who is Adore? A. They were referring to my oldest daughter. It's not Adore. It's Dora.

Q. Did anybody ever call her Adore before this article? A. No, sir.

Q. And even the children, even her brothers and sisters, was that name Adore ever used? A. No, sir.

Q. Now, it says she wears dirty, ill-fitting slacks. Did she always wear dirty, ill-fitting slacks? A. No, sir.

Q. Does she have clean, nice clothes? A. Yes, sir.

Q. Incidentally, did you go to church together? A. Most of the time.

Q. And did you have good clothes when you went to church? A. Yes, sir.

[25] Q. And were they ill-fitting clothes? A. No, sir.

Q. Do you do any seamstress work? A. Yes, sir.

Q. And your daughters, did they also? A. No, they don't sew.

Q. All right. Now, it says here, "The pillows of the couch are missing. You sit on springs." Now, you tell the members of the jury if that was so at that time? A. It was not. We had a new couch. It wasn't but about six months old at the time. And the cushions could not be removed from the couch.

Q. Now, it says here a little further down on that page, "The other kids sat around the room. Their clothes are tattered." Now, were they in tatters? A. No.

Q. Your children, in rags? A. No.

Q. Did they have good clothes? A. They did.

Q. And when they went out in public, did they wear neat, clean clothes? [26] A. Yes, sir.

Q. It says, "An old furnace stands in the middle of the room." Did you ever have a furnace standing in the middle of the room? A. No, sir. We had a heating stove, but it was not a furnace.

Q. Were you out of coal at that time? A. No, sir.

Q. It says here: "Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of non-expression she wore at the funeral. She is a proud woman. Her world has changed. She says that after it happened, the people in town offered to help them out with money and they refused to take it." Did you say any of that? A. I have never talked to anyone from the Cleveland Plain Dealer about anything like that.

Q. Did you tell anybody your world has changed? A. No, sir.

Q. In fact, aside from the loss of your good husband, has your family's world changed at all? A. Of course, they miss him, but we are about the same as [27] we were then.

Q. Now, did you ever hear your family or children or yourself referred to as hillbillies? A. No, sir.

Q. And did the children ever call each other hillbillies? A. No, sir.

Q. Now, the same page in the next column, there is a reference to you that: "She listens to the opry a lot." Can you say opera? A. Yes, sir.

Q. Let's hear you say it. A. Opera.

Q. Did you ever use the term opry? A. No, sir.

Q. To your knowledge, do the children use that word? A. No, sir.

Q. Now, do you have anything but hot dogs and hamburgers to eat at home? A. Yes, sir.

Q. At that time, is that the best meal that these kids had? A. No, sir.

Q. Do you cook? **[28]** A. Yes, sir.

Q. Incidentally, did you ever hear Bruiser, your youngest, call a man by the name of Dicky, Daddy? A. No, sir.

Q. Was there any resemblance between Dicky and his daddy? A. No, sir.

Q. Now, as far as these other pictures—the picture of your house, first of all, I want you to tell the members of the jury, this little house that is shown in the photograph opposite where Bruiser's picture is—incidentally who named him Bruiser? A. His daddy gave him that nickname.

Q. So that was true that he was referred to as Bruiser, kiddingly, right? A. Yes, sir.

Q. All right. Now, across from his picture there is a picture of the house. Now, you tell the members of the jury, was this house on the property in its present form or in the form it looks like in this photograph when you bought the place? A. No, sir. We built.

Q. You built onto it, is that right? A. We built onto it.

Q. And was the building of it completed when your husband **[29]** met his tragic death? A. Yes, sir.

Q. Do you have a kitchen in there? A. Yes, sir.

Q. Do you have carpets? A. No, sir.

Q. Linoleum? A. We have linoleum.

Q. How many rooms do you have? A. Six rooms.

Q. How many bedrooms? A. Three.

Q. And you have a living room? A. Yes, sir.

Q. I guess you did have a duck named Gertrude, did you? A. A goose.

Q. And some puppies, right? A. Yes.

Q. In all these photographs, I am going to have you look at them as they were taken.

Mr. Sherman: If your Honor please, at the deposition of Defendant Conway—

The Court: If you have something to say, please approach the bench. I do not want **[30]** any comments in front of the jury.

(The following proceedings were had out of the hearing of the jury.)

Mr. Sherman: If your Honor please, these have already been identified and stipulated for identification.

The Court: Have them marked.

Mr. Sherman: May we use the same—

The Court: No. He will mark them.

Mr. Sherman: That is what I was going to ask.

(The foregoing proceedings were had out of the hearing of the jury.)

(Thereupon, Plaintiffs' Exhibits 2, 3, 4, 5 and 6 were marked for identification.)

Mr. Sherman: With your Honor's permission, we will offer in evidence Plaintiffs' Exhibits 2 through 6.

The Court: Mr. Warder?

Mr. Warder: No objection.

The Court: They may be admitted.

[31] By Mr. Sherman:

Q. I want you, Mrs. Cantrell, to please look at Plaintiffs' Exhibits 2, 3, 4 and 6. (Handing photographs to the witness.) All right? Now, what children are shown in those photographs?

The Court: Why don't we take them one at a time?

Mr. Sherman: Yes. Pardon me.

Q. Take No. 2. Who is in that? A. Dora, Juanita, Keith, Nancy and David.

Q. All right. And No. 3? A. Dora.

Q. And No. 4? A. Dora and David.

Q. In any one of those pictures, is any child smiling? A. No, sir.

Q. Does any child have his hair combed?

Mr. Warder: Objection.

The Court: Sustained.

A. No, sir.

The Court: Sustain the objection. When the objection is sustained, Mrs. Cantrell, you are not supposed to answer. [32] The jury will disregard the answer.

Q. Does any one of the children have his best clothes on in those pictures?

Mr. Warder: Objection.

The Court: Overruled.

A. No, sir.

Mr. Sherman: Now, it is stipulated that these are prints of the photographs used in the article, if your Honor please, except that No. 6 is a reverse. The negative was reversed when it was printed. And I ask leave at this time to have the jury look at these photographs.

The Court: The jury may view the photographs.

Why don't you give them three at one side and three at the other?

Mr. Sherman: Well, there are only five.

The Court: Three and two.

(Short pause while the jury views the photographs.)

By Mr. Sherman:

Q. Incidentally, referring to Plaintiffs' Exhibit 3, which is a photograph—of Dora? A. Yes, sir.

[33] Q. Of Dora, she is standing beside a structure with a door that is on a tilt. What is that building? A. That's the wash house, and the hinge came off.

Q. This is not part of your home, is that right? A. No.

Q. With respect to the roof of the house that is in the article which is now identified as Exhibit 5, would you tell us what is this? What kind of roof was it? A. I don't know the name of it but it's—

Q. Who put it on? A. My husband.

Q. How long before his death was that put on? A. Oh, I would say about a year.

Q. Was it a good roof? A. Yes, sir.

Q. Did you have heat in your house? A. Yes, sir.

Q. Did the children always have colds? A. No, sir.

Q. Now, was there any farming done on your land? A. Yes, sir.

Q. What kind? A. We raised tobacco.

Q. How much land? [34] A. Beg your pardon?

Q. How much of your land was raising that? A. Half an acre.

Q. What else? A. Garden—potatoes, corn.

Q. Field corn? A. Yes, sir.

Q. That would be truck gardening, right? A. Yes, sir.

Q. Did you raise enough produce or vegetables for your own family? A. Yes, sir.

Q. And did you have any surplus, any more than you needed yourself that you could sell? A. No, sir.

Q. Did you have any preserves? A. Yes, sir.

Q. What kind of preserves? A. I made strawberry preserves, blackberry preserves—every kind I could.

Q. Did you have them in May of 1968? A. Yes, sir.

Q. Now, I want to ask you, as of that time what school or schools did your children attend? [35] A. Part of them attended Woods Elementary.

Q. Woods? A. Woods.

Q. Where is that? A. It's below Gallipolis area about four miles from where we live.

Q. How did they get there? A. School bus.

Q. And that's another thing I was going to ask you. Does the school bus stop near your home? A. About a quarter of a mile from it.

Q. How many of the children went to Woods? A. At that time?

Q. Yes. A. Three, I think.

Q. And where did the others go? A. I had one in junior high in Point Pleasant.

Q. And what was the name of that school? A. Point Pleasant Junior High.

Q. All right. A. And one in Point Pleasant Senior High.

Q. Now, aside from living as a family, did you have any community activities in which you participated? A. They all belong to 4H group.

[36] Q. 4H group. For some of us city folks, tell us what is a 4H group? A. I don't know how to explain it. It's a group that helped—well, like helping with pollution or cleaning up roadways and cleaning up the cemetery, and anything to help the community.

Q. And how many of your children were involved in that kind of activity? A. Four.

Q. Now, is that as of 1968? A. Yes, sir.

Q. Have they continued in this kind of activity? A. They still belong to 4H group.

Q. With respect to their schooling, has any one of them dropped out since Dad's death? A. No.

Q. Has anyone flunked out? A. No, sir.

Q. Are their marks just as good as they were? A. Yes, sir.

Q. Now, you said that your oldest daughter—Lolita? A. Yes, sir.

Q. Married three years ago, right? A. Yes, sir.

[37] Q. That would be in 1969; is that right? A. Yes, sir.

Q. So aside from Lolita, has there been any interruption in schooling for the other children? A. No.

Q. Now, I want to ask you this. When you first saw this article, what was your reaction? A. I would say I was mad.

Q. And what else? What else happened to you personally? A. Well, they just made us all, I don't know, so upset and mad that—

Q. You said upset. Now, tell us, when you were upset, how long did this upset last, for example? A. Well, I don't remember exactly.

Q. Were you upset enough to see somebody about it, to go and try to do something about it? A. Yes, sir.

Q. And what did you try to do about it? A. I came to you about it.

Q. Was I the first one you came to about it? A. No, I went to a lawyer in Point Pleasant.

Q. And others? A. No, that's all.

Q. Why? What impelled you to go and seek legal help? **[38]** A. Because it was all untruths that were in the paper and there had been neighbors and friends that had read it, and the children came home from school, come home crying because they had been making fun of them in school because of the article.

Q. Now, has this completely gone or is there still some reaction? A. There is still some. They will tease or make fun of the children when they go to school because of it.

Q. But you haven't given up your house? A. No, sir.

Q. Now, how did it affect your own appetite or your ability to sleep? A. Well, I was just nervous.

Q. When you read what you were supposed to have said, what was your reaction to that? A. Well, that made me mad because I didn't say it.

Q. Did you attempt to get a retraction? Did you call the Cleveland Plain Dealer and ask them to retract it? A. The lawyer in Point Pleasant did.

Q. Was there ever any retraction printed, to your knowledge? A. Not to my knowledge.

Mr. Sherman: Cross-examine.

The Court: You may cross-examine, Mr. [39] Warder.

Mr. Warder: May I have a moment, your Honor?

The Court: Yes.

(Short pause.)

CROSS EXAMINATION OF MARGARET MAE CANTRELL

By Mr. Warder:

Q. Mrs. Cantrell, are you familiar with the radio program out of Nashville, Tennessee, known as Grand Ole Opry? A. I didn't hear you.

Q. Are you familiar with a radio program that originates in Nashville, Tennessee, known as Grand Ole Opry? A. Yes, sir.

Q. And it is spelled O-p-r-y, isn't it? A. To my knowledge, it was Opera. I don't know.

Q. Do you know how it is spelled? A. I don't know how they spell the Grand Old Opera, no.

Q. Mrs. Cantrell, when did you first learn that anyone had visited your home and talked to the children? A. When I got home the same evening that they had been there.

Q. When was this? [40] A. I'm sorry, I don't remember the date.

Q. Do you remember what time of year it was? A. In May; somewhere along there.

Q. Do you remember what kind of a day it was? A. Yes, I remember it was pretty wet.

Q. Now, did your children tell you who had been there? A. No, they didn't.

Q. Did you ask them? A. Yes, sir.

Q. How old was Dora at that time? A. 16, 17, something like that.

Q. Did the children know that they were newspaper reporters? A. To my knowledge, they did not.

Q. Were you advised that pictures had been taken? A. Yes.

Q. Did you make any inquiry among the neighbors or in the town to see if anybody knew who had been there? A. Yes, sir.

Q. Did you learn? A. No, sir.

Q. Had you ever, either before or since that instance, talked to any newspaper reporter from any paper? A. Yes, sir.

[41] Q. And about when was this? A. I don't remember.

Q. Was he a reporter from a paper in Dayton, Ohio? A. Yes, sir.

Q. Did you ever see the article he wrote? A. Yes, sir.

(Thereupon, Defendants' Exhibit 1 was marked for identification.)

The Court: Members of the jury, perhaps this would be an opportune time for us to take a very brief recess before the lunch hour. Of course, during the recess, you will recall the Court's admonition, and that is not to discuss this case among yourselves or with anyone else. You are to keep an open mind until such time as all of the evidence has been presented, the Court has instructed you on the law and its application to the facts in this case, and the matter is

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submitted to you for your deliberation. With that, we will take a five or ten-minute recess.

(Short recess was taken.)

The Court: You may proceed.

[42] By Mr. Warder:

Q. Mrs. Cantrell, I hand you what has been marked for identification as Defendants' Exhibit 1. Is that the article which we were discussing before the recess? A. Yes, sir.

Q. When did you first see that article? A. I don't remember.

Q. Was it shortly after it was printed? A. Yes, sir.

Q. Did you make any objection to that article? A. No, sir.

Q. Did you file any lawsuit about it? A. No, sir.

Q. Mrs. Cantrell, did you ever see the write up of your husband's funeral as it appeared in the Plain Dealer? A. What are you talking about?

Q. The story of your husband's funeral as it was printed in the Plain Dealer? A. I read the article about all of us in August is all I read.

Q. You didn't see any other articles in the Plain Dealer about your husband? A. No, sir.

(Thereupon, Defendants' Exhibit 2, 3 and 4 [43] were marked for identification.)

Mr. Warder: Shall I proceed, your Honor?

The Court: Yes.

By Mr. Warder:

Q. Mrs. Cantrell, I appreciate you said you didn't recall the article. I just thought it might refresh your recollection. I am handing you what has been marked Defendants' Exhibit 2. Have you ever seen that article before? A. No, sir.

Mr. Sherman: I would ask the Court, may we approach the bench?

The Court: Yes, you may.

(The following was out of the hearing of the jury.)

Mr. Sherman: If your Honor please, Defendants' exhibit identified as Exhibit 3 is a copy of the complaint lodged at Civil Action 68-149.

Is this 149?

Mr. Warder: I think so. I'm not real sure myself.

[44] Mr. Sherman: In the Southern District of West Virginia, Charleston—

Mr. Warder: I can check the number for you.

Mr. Sherman: —by myself and Stanley Prizer of Charleston, which action was served on the defendant. The Court adjudicated the matter in favor of the defendants' motion to dismiss the action as not the best forum for the lawsuit, and I object to the use of this complaint and for cross-examination purposes.

Mr. Warder: I might say if counsel will stipulate the authenticity of these documents, I won't ask the witness a word about them.

Mr. Sherman: Well, I assume it is authentic but not material, relevant or competent at this time.

The Court: Well, as I understand it, Mr. Sherman, you are not objecting to the authenticity?

Mr. Sherman: No, your Honor.

The Court: Or the accuracy of the document. Your only objection is to materiality, [45] admissibility?

The Sherman: Yes.

The Court: Very well.

Mr. Sherman: And it is not the same kind of complaint as we filed here.

The Court: I am aware of that. One is in libel and one is a negligence action.

Mr. Sherman: Yes.

The Court: I assume from what you have said then, Mr. Warder, you won't cross-examine the witness?

Mr. Warder: I won't interrogate the witness on that.

The Court: And we can discuss the materiality and admissibility outside the hearing of the jury at a later time.

Mr. Sherman: Yes. Now as to No. 4 exhibit, Defendant's that has been identified as No. 4, it appears to be a photostatic copy of a civil action at 63-337—somebody's giving you bad photocopies—of an action brought for the death or for the loss of Melvin Cantrell in the Silver Bridge disaster and for injuries sustained by her in that fall, which action is still pending **[46]** before the Multidistrict Litigation Panel of the Supreme Court on preliminary matters and on motions and has nothing whatever to do with the—

The Court: Let me ask you this, Mr. Sherman.

Mr. Sherman: Yes, your Honor?

The Court: Again, you are not objecting to authenticity at this time?

Mr. Sherman: Your Honor, I haven't read it, but I assume that it is a copy and I will not object to it.

The Court: Very well.

Mr. Sherman: On Mr. Warder's representation that it is a true copy.

Mr. Warder: All I know is I got it from the defense counsel.

Mr. Sherman: All right.

The Court: Very good. In view of that, we will dispose of it as to materiality and admissibility at a time outside of the presence of the jury.

Incidentally, gentlemen, I have a Judges' meeting at 1:00 o'clock. Consequently, we will not reconvene until 2:00 o'clock. Hopefully, we **[47]** will be concluded with our Judges' meeting. I just wanted to tell you that while I had you here.

You may proceed. And you will not offer those at this time.

Mr. Warder: Oh, no, not now.

The Court: All right.

(The foregoing was had out of the hearing of the jury.)

Mr. Warder: I am almost through.

By Mr. Warder:

Q. Mrs. Cantrell, in May of 1968, was there a telephone in your home? A. I don't remember.

Q. Would it help to look at the exhibit and see if you can see the telephone wire in it? A. It didn't run in. We had a telephone and then I had it taken out, and I don't remember just when I had it taken out.

Q. Now, Mrs. Cantrell, you did not find the article, Exhibit 1, Defendant's Exhibit 1, offensive, did you? A. No, sir.

Q. So isn't it fair to say, Mrs. Cantrell, that you objected to the Plain Dealer article not because of the publicity but because of what it said? **[48]** A. Yes, sir.

Mr. Warder: Thank you. Nothing further, your Honor.

The Court: Mr. Sherman?

Mr. Sherman: Just a couple questions, if your Honor please.

RE-DIRECT EXAMINATION OF MARGARET MAE CANTRELL

(Thereupon, Plaintiffs' Exhibits 7, 8, 9, 10, 11 and 12 were marked for identification.)

Mr. Sherman: Thank you for your patience.

By Mr. Sherman:

Q. Mrs. Cantrell, as far as the article that's been identified as Defendants' Exhibit 4 lying before you, the Dayton paper, were you interviewed? A. Yes, sir.

Q. And did you permit yourself to be interviewed? A. Yes, sir.

Q. And what date was that?

Will you look at the date of the paper? A. It's dated December 15, 1968.

Q. December 15, 1968? **[49]** A. Yes, sir.

Q. And, of course, the paper was published several months after the August 4th publication in the Plain Dealer; is that right? A. Yes, sir.

Q. The headline of that story about your interview says what? A. "Some help not welcome to bridge widow—"

Q. Please keep your voice up. A. "Some help not welcome to bridge widow and family."

Q. All right. Now, Mr. Warder asked you whether you had talked to reporters. Did you talk to any reporters before the article in the Cleveland Plain Dealer? A. No, sir.

Q. Now, afterwards, did you talk to any other reporters in addition to the one in Dayton? A. You are referring to that one. I didn't have to talk to her because she was a neighbor and a good friend, and she worked on this newspaper and she wrote that on her own.

Q. That is who? A. Mary Hyre.

Q. Now, I show you Plaintiffs' Exhibit 7 which is part of The Messenger, Athens, Ohio, Sunday, September 22, **[50]** 1968, and it's an article by Mary Hyre, and ask you whether this is the article that you are now talking about as having been the product of Mary Hyre's own journalism? A. Yes, sir.

Q. And, of course, were you interviewed by her in connection with that article? A. She asked me a few things, but it wasn't an interview that I knew she was going to print.

Q. Now, why were you willing to be interviewed by either Dayton or Athens, Ohio, papers after the publication of The Cleveland Plain Dealer story? A. Because they were writing what I thought about the Cleveland Plain Dealer and telling the untruths in it.

Q. In other words, you were complaining to them about the Cleveland Plain Dealer story? A. Yes, sir.

Q. All right. Did you want the publicity even if it were right? Did you ask for any publicity for yourself and your children on August 4, 1968? A. No, sir.

Q. When you were talking about publicity in answer to Mr. Warder's question, what were you referring to when you said—

[51] Mr. Sherman: I will withdraw the question. Sorry. Obviously, the witness didn't understand.

I offer in evidence Plaintiffs' Exhibit 7.

I didn't hear Mr. Warder offer Exhibit 4. I don't know, but if he didn't, I will offer it.

Mr. Warder: Please don't offer 4. It is Exhibit 1 I offered.

The Court: You are offering Plaintiffs' Exhibit 1?

Mr. Warder: Defendants' Exhibit 1.

The Court: I'm sorry, Defendants' Exhibit 1. No objection on the part of the plaintiff?

Mr. Sherman: No.

The Court: It may be admitted.

And you are now offering, Mr. Sherman—

Mr. Sherman: Plaintiffs' Exhibit 7.

The Court: Plaintiffs' Exhibit 7?

Mr. Sherman: Yes, your Honor.

The Court: And there is no objection to that, Mr. Warder?

Mr. Warder: (Nodding in the negative.)

The Court: It may be admitted, absent [52] objection.

Mr. Sherman: Now, if your Honor please, I have had identified as Plaintiffs' Exhibits 8, 9, 10, 11 and 12—

The Court: Are you offering those at this time?

Mr. Sherman: —the birth certificates of the five children remaining as plaintiffs in this case, and I offer them in evidence.

The Court: They may be admitted.

By Mr. Sherman:

Q. Did you read the Mary Hyre article, which is Plaintiffs' Exhibit 7? A. Yes, sir.

Q. Was that an accurate report of what is contained therein? A. Yes, sir.

Q. And was Mary Hyre interviewing your children or you? A. She didn't interview either one. She didn't talk to the children. She talked to me any time she saw me.

Q. And as to the Dayton paper—pardon me, Defendants' Exhibit 4—which is now in evidence—

I'm sorry, I forgot the name of the reporter. Is it there?

[53] —David Lyon, did he—

Mr. Warder: Object to that your Honor.

The Court: Approach the bench.

(The following was out of hearing of the jury.)

Mr. Warder: There is no by-line on that article.

Mr. Sherman: It says that on the front of the page there.

The Court: It doesn't say. There is no by-line on there.

Mr. Sherman: Over on the left where your thumb is.

Mr. Warder: It's a different article.

Mr. Sherman: Oh, is it a different article? It's all about the same thing.

The Court: Sustain the objection.

Mr. Sherman: I'm sorry.

(The foregoing was out of the hearing of the jury.)

By Mr. Sherman:

Q. I will put the question to you in a different way, Mrs. [54] Cantrell. Do you remember the name of the man or woman, whoever the reporter was, from the Daily News of Dayton? A. No, sir.

Q. Was it a man or woman? A. A man.

Q. Well, now, Dayton is pretty far from Point Pleasant. Do you know how far? A. No, sir.

Q. How did you happen to get together, you and that reporter from Dayton? A. He came to my home.

Q. Were you home when I came? A. Yes, sir.

Mr. Sherman: That's all, unless Mr. Warder has something else.

The Court: Recross, Mr. Warder?

RE-CROSS EXAMINATION OF MARGARET MAE CANTRELL

By Mr. Warder:

Q. Mrs. Cantrell, you say Plaintiffs' Exhibit 7 is accurate. That is the story written by your neighbor, Mary Hyre? **[55]** A. Yes, sir.

Q. Then the very day the Plain Dealer reporters were there, when you got home you knew they were from Cleveland, didn't you? A. No, I didn't.

Q. Would you look at the article?

Mr. Warder: May I approach the witness, your Honor?

The Court: Certainly.

Q. Mrs. Cantrell, would you read this with me?

"Mrs. Cantrell told me she was not home when the two men arrived. They told her children they were from Cleveland and questioned them." Did you tell Mary Hyre that? A. I'm sorry. If I knew it, I have forgotten it.

Q. But you knew it at that time, didn't you? A. If I told her that, I must have known it at that time.

Mr. Sherman: Just a moment.

A. But I forgot.

Mr. Sherman: Objection, your Honor.

The Court: Overruled. You may answer the question.

I don't want counsel interrupting answers here.

[56] Mr. Sherman: Oh, I'm sorry. I thought she was finished with her answer.

The Court: Have you finished your answer, Mrs. Cantrell?

The Witness: Yes, sir.

The Court: All right. There is an objection?

Mr. Sherman: Yes.

The Court: Objection is overruled.

Proceed with the next question.

Mr. Warder: Nothing further.

The Court: Would you like further examination?

Mr. Sherman: With your Honor's permission, I just want to clear one thing up.

RE-DIRECT EXAMINATION OF MARGARET MAE CANTRELL

By Mr. Sherman:

Q. Now Mrs. Cantrell, Mr. Warder's question to you was whether you knew they were from The Cleveland Plain Dealer, these men that had been there; is that right?

Mr. Warder: Objection. It was not my question.

[57] The Court: Read the question back. My recollection was you knew they were from Cleveland.

(Thereupon, the reporter read back the following question:

"Then the very day the Plain Dealer reporters were there, when you got home you knew they were from Cleveland, didn't you?")

By Mr. Sherman:

Q. Did you know they were from the Plain Dealer and did that article say—

The Court: Let's ask her one question at a time, please.

Mr. Sherman: Pardon me.

Q. Did you know the same day these men were there, Eszterhas and Conway—

Mr. Warder: Objection.

The Court: Overruled.

Q. —did you know they were from The Plain Dealer when you got home? A. No, sir.

Q. And does that article from Mary Hyres say you knew they were from The Cleveland Plain Dealer?

Mr. Warder: Object.

[58] The Court: Sustain the objection. The article speaks for itself.

Mr. Sherman: All right, your Honor. I didn't want it confused. That's all.

Mr. Warder: Object to the statement of counsel.

The Court: Counsel's statement will be stricken. As I have indicated to counsel previously, I don't want any statement. Just ask questions of the witnesses, please.

Members of the jury, in view of the hour, we will take our afternoon luncheon recess. I am informed that during the recess there is a Judges' meeting at 1:00 o'clock. Consequently, I will not be able to return, hopefully, until—I should say hopefully promptly at 2:00 o'clock.

In view of that, we will recess until 2:00 o'clock, and during the course of the recess, you will keep in mind the Court's admonition, and that is not to discuss the case either among yourselves or with anyone else; you are to keep an open mind until such time as all of the **[59]** evidence has been introduced and the parties have rested, the Court has charged you on the law and its application to the facts in this case and the matter has been submitted to you for your deliberation and your decision.

With that, we may recess until 2:00 o'clock. The witness is dismissed.

(Recess for the lunch hour.)

[60] Tuesday, September 12, 1972, 2:00 P.M.

The Court: Call your next witness, Mr. Sherman.

Mr. Sherman: Yes, your Honor.

William David, come forward, please, and be sworn.

William David Cantrell, a witness called on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF WILLIAM DAVID CANTRELL

By Mr. Sherman:

Q. Now, please keep your voice up, and state again your full name. A. William David Cantrell.

Q. How old are you, sir? A. 17.

Q. What is your birth date? A. June 27, 1955.

Q. So you became 17 this past June? A. Yes, sir.

[61] Q. And you live with your mother and brothers and sisters? A. Yes, sir.

Q. And what school do you attend? A. Point Pleasant High School.

Q. What grade are you in? A. Twelfth.

Q. Is that the first or second part of the twelfth year? A. That's the first.

Q. So you are a senior, first semester, is that right? A. Yes, sir.

Q. Am I correct that that is designated as the senior class? A. Yes, sir.

Q. Are you in good standing in your class? A. Yes, sir.

Q. And you live at home? A. Yes, sir.

Q. Do you do any work at home? A. Yes, sir.

Q. What do you do? A. Mostly work around the house that needs to be done, and outside.

Q. I'm sorry, I didn't hear the second part. You work around the house and— **[62]** A. I do work to the house, repair work, and things out in the yard that need to be done.

Q. Do you do any planting on any of the farm? A. Yes, sir.

Q. Now, tell us, before your dad was killed, what kind of activity did you have around your land? What did you do for pleasure? A. I used to ride horses.

Q. Did you have a horse? A. Yes, sir.

Q. How many horses did you have in the family? A. Sometimes we have seven, or nine sometimes.

Q. How many members of the family rode horseback? A. All of us but baby Bruiser.

Q. Do you still have horses? A. No, sir.

Q. When were they disposed of? A. Just a couple years—

Q. Or sold. I don't mean disposed of. A. Just a couple years ago.

Q. That would be 1970, two years ago? A. Somewhere around there.

Q. From the date of your father's death in December of 1967 until 1970, did you still ride horses on your land? **[63]** A. Yeah, we had a few after that. Not too many.

Q. What other kind of sports did you partake in? A. Well, I play baseball sometimes.

Q. What is the 4-H group? A. It's a club to help around the community and do projects for the fair. Things like that.

Q. And the fair you are talking about, where is the fair held? A. County fair, TNT area.

Q. What area? A. It's called the TNT area. It's above Point Pleasant.

Q. Above Point Pleasant? A. About 5 miles above Point Pleasant.

Q. TNT, like explosives? A. Yeah, it used to be.

Q. Oh, it used to be an explosives plant or land? A. Yes.

Q. And they have a fair there? A. Yes, sir.

Q. Do you take part in it? A. Yes, sir.

Q. Did you display anything there? A. Yes, sir.

Q. What, for example? **[64]** A. I am in a class in school that is called FFA and we do projects in it.

Q. What is FFA? A. Future Farmers of America.

Q. O.K. A. And we have projects in there that we do and projects we do in the 4-H club.

Q. Tell me this; do you remember when pictures were taken at your home in May of 1972, or whenever it was in 1972? Do you remember the occasion when two gentlemen came to your home and one of them took pictures? A. I don't remember it in 1972.

Q. When was it? Oh, I beg your pardon. In 1968 is what I meant. A. Yes.

Q. You were there, were you? A. Yes.

Q. And your picture appears in the article, doesn't it? A. Yes, sir.

Q. Now, in 1968, that's four years ago, so you would have been 13, correct? A. Yes, sir.

Q. At that time, did you have shoes? A. Yes, sir.

[65] Q. Did you have nice clothes? A. Yes, sir.

Q. When you did work around the farm, did you wear good clothes or old clothes? A. I wore work clothes.

Q. Work clothes. All right. Now, do you remember either of these gentlemen that came into your farm—when did you first see them coming onto the farm or into the house? A. We seen them coming across the field, coming to the house.

Q. When you say across the field, was that along a road that was there? A. Well, the road kind of curves around and there's a field in between our house and the road where it curves around, and they were coming across it instead of coming around the curve.

Q. They were sort of coming straight, making a shortcut, is that it? A. Yes, sir.

Q. What called your attention to their coming? A. I'm pretty sure I was getting ready to walk out the door to do something outside, and I seen them.

Q. Then when you saw them coming, tell us, do you remember [66] who was in the house with you when you saw them coming? A. No, sir, I don't.

Q. Was there anybody else there with you? A. Yes. There was my sisters and brothers, but I don't remember who was in the house with me.

Q. All right. You remember anybody who first talked with either of these men that was coming towards the house? A. Well, we didn't talk to them until they came into the house.

Q. Was the door opened or closed? A. It was open.

Q. And they walked in and—

Mr. Warder: Objection.

The Court: Sustained. Leading.

Mr. Sherman: Pardon me. I will rephrase the question.

Q. Did you see them come in? A. Yes. They walked into the door.

Q. All right. The first room that they would come into, what would you call that in the house? A. The living room.

Q. And what furniture did you have in the living room at that time? A. We had a sofa, chair, television, a few end tables, I [67] think.

Q. You had a television? A. Yes, sir.

Q. Did it work? A. Yes, sir.

Q. As far as the sofa is concerned, would you please describe it to the members of the jury? A. Well, it's been so long ago and we have had two or three new couches since then that I don't remember what it looked like.

Q. All right. Will you tell us now, you recall either of these men identifying themselves, saying who they were or where they were from? A. I don't remember.

Q. Did anybody hand you a card and leave anything at all in writing or printing to say who they were or who they represented? A. No, sir.

Q. Do you remember pictures being taken? A. Yes, sir.

Q. By one of them? A. Yes, sir.

Q. And was any question asked by either one of these men about any picture that was being taken? [68] A. No.

Q. Was your mother home? A. No, sir.

Q. Do you remember either of these gentlemen asking for your mother? A. Yes, sir.

Q. All right. Asking you? A. No, I don't think they asked me. They might have asked my older sister.

Q. Was it in front of you? A. Yes, sir.

Q. Do you remember what the answer was? A. She said that Mom was at work then.

Q. And did they ask any more questions about where or how they could contact her? A. I don't remember if they did or not.

Q. As a matter of fact, do you remember what part of the day it was that they came into the house? A. It was in the morning.

Q. Had you already had breakfast before they got there or did you eat afterward? A. It was before they got there.

Q. You mean you ate before? A. Yes.

[69] Q. Did the other children have their breakfast before, as well? A. Yes, sir.

Q. And do you remember whether you had yet had your lunch when they left the house? A. No, sir.

Q. You don't remember, or you didn't? A. We didn't have it yet.

Q. All right. So did they indicate in any way or any words whether they were going to wait for your mother? A. No, sir.

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Q. Had you ever seen these men before? A. No, sir.

Q. Have you ever seen them since? A. Just yesterday I seen Mr. Conway there.

Q. If he hadn't been identified to you as Mr. Conway, would you have remembered him? A. No, sir.

Q. Now, aside from that, do you remember then later on the article that appeared in The Plain Dealer on the Sunday of August 4, 1968? You remember that article? A. Yes, sir.

Q. How did it first come to your attention? [70] A. We just got it in the mail, and I was the first one to read it because I was the one that got the mail that morning.

Q. After that did you hear any more about it? A. Yes, sir.

Q. Where? A. School.

Q. Anywhere else? A. Neighbors around home.

Q. How did you react? How did you personally feel when this came to your attention in any way? A. I didn't like it.

Q. Why? A. Because the things they said about my father, surrounding community, and—

Q. All right. Did either of these men tell you that they were going to publish what they took or heard that morning in all the time they were there? A. No, sir.

Q. Did you hear the words "Cleveland Plain Dealer" at any time that they were there? A. Not as I remember.

Q. Will you tell us what you observed as to what part of the house or how many rooms of the house they went into? [71] A. Just the living room.

Q. And did they even look into the kitchen? A. Well, there was a hall in between the kitchen and the living room. They might have looked through the hall.

Q. But did you observe them walking into the kitchen? A. No, sir.

Q. Do you remember them asking whether you had enough food? A. No, sir.

Q. Do you remember them asking whether you had enough coal? A. No, sir.

Q. Do you remember them asking whether you had any clothes? A. No, sir.

Q. And did they look into the three bedrooms that you have in the house? A. No, sir.

Q. Did you observe your mother's reaction, how she felt about what was published? A. Yes, sir.

Q. What did you observe? A. She looked pretty mad when she read it.

Q. And did she express her attitude or her feelings? A. Yes, sir.

[72] Q. Now, what about your brothers and sisters? How did they feel about this publication? A. The same as me and my mother felt.

Q. Did you at any time, personally, willingly volunteer to have your picture taken or to give any statements to these men? A. Not as far as I know of, sir.

Mr. Sherman: Cross-examination.

The Court: Cross-examination?

Mr. Sherman: Excuse me. May I ask leave to ask one more question, with your permission?

The Court: Yes, you may.

Mr. Sherman: Excuse me, Mr. Warder.

By Mr. Sherman:

Q. Pardon me, David. I wanted to ask you one thing. Did you use the word "hillbilly" about yourself, your brothers, your sisters, to either one of these men or in their presence? A. No, sir.

Mr. Sherman: All right. Thank you.

The Court: Now, Mr. Warder.

Mr. Warder: Thank you.

[73] CROSS EXAMINATION OF WILLIAM DAVID CANTRELL

By Mr. Warder:

Q. Handing you what has been marked Plaintiffs' Exhibits 2 and 4—they are photographs—

The Court: Please keep your voice up. The jurors can't hear you.

Q. Would you look at them, please?

Mr. Warder: Thank you, your Honor.

The Court: Those are 2 and 4?

Mr. Warder: 2 and 4.

Q. Is your picture in either of those photographs? A. Yes, sir.

Q. Is it in both of them? A. Yes, sir.

Q. Was your picture in any other of the photographs that appeared in the article? A. I don't remember whether I was in those pictures. I could have been.

Q. Now, the picture taken inside the house, there are four of you in the picture, aren't there? A. There's five.

Q. Five of you? And you are grouped together, aren't you? A. Yes, sir.

Q. Now, that picture is posed, isn't it? **[74]** A. What do you mean, sir?

Q. You were asked to get in a group and have your picture taken, weren't you? A. No, sir.

Q. Then how did you get in the group? A. We were just sitting there talking to the reporter and the photographer.

Q. Did you know a picture was going to be taken? A. No, sir.

Q. How many pictures had been taken when that picture was taken? A. I don't remember how many was taken when this picture was taken.

Q. How many were taken altogether? A. 50.

Q. At any time while these pictures were being taken, did you say to the photographer, "Please don't take my picture any more?" A. No, sir, not as I remember.

Q. Did you at any time tell him you wouldn't want your picture taken? A. No, sir.

Q. Now, by the time he got through taking 50 pictures, you knew you were being photographed, didn't you? **[75]** A. Yes, sir.

Q. Now, you first met these gentlemen inside the house, did you not? A. Yes, sir.

Q. The second photograph—I don't know the exhibit number—in front of you is taken outdoors, isn't it? A. Yes, sir.

Q. Did he ask you to come outdoors for the picture? A. I don't remember.

Q. He didn't drag you out to photograph you, did he? A. No, sir.

Q. Now, going back to the day this happened, it was a Saturday, wasn't it? A. I don't remember, sir.

Q. Well, it was in May, wasn't it? A. As far as I know, yes, sir.

Q. And school was going on, wasn't it? A. Yes, sir.

Q. So it had to be either a Saturday or a Sunday, didn't it? A. Yes, sir.

Q. Now, when these gentlemen came to your house, did they ask to come in? A. No, sir. The door was open and they stepped inside **[76]** the door and asked for mother.

Q. Did anybody ask them in? A. No, sir.

Q. Where was your sister Dora at the time? A. I believe she was in another part of the house.

Q. When they arrived? Did anybody ask them to get out? A. No, sir.

Q. At any time did you know that these gentlemen were with a newspaper? A. No, sir, not until they started asking questions.

Q. Then you did know it? A. Then I assumed they were with a paper.

Q. And did you refuse to answer their questions? A. No, sir.

Q. Did you ask them what paper they were with? A. No, sir.

Q. Now, let's be quite careful about this. Are you telling me that you didn't ask them or are you telling me that you can't presently remember whether you asked them? A. Well—no, I don't remember if I did or not.

Q. How long were they there? A. I don't remember. It could have been an hour, hour and a half.

[77] Q. Do you recall whether at the time you had the telephone or not? A. No, sir.

Q. Now, you told us that your brothers and sisters felt the same way you did, didn't you? A. Yes, sir.

Q. Now, at the time this happened, Juanita was how old? When is her birthday? A. It's August the 10th.

Q. So she would have been 12 years old. Or is she younger than you are? A. She is younger.

Q. Terry would have been 9 years old, wouldn't he? A. As far as I know, yes, sir.

Q. Nancy would have been 5 years old? A. No, sir. Nancy was going to school at that time.

Q. She wasn't there? A. No. Maybe she was 5. I don't remember how old she was.

Q. Is she in the picture? A. Yes, sir.

Q. Then she was there, wasn't she? A. Yes, sir.

Q. Was Nancy really upset at this publication? [78] A. Well, I don't guess she really knowed what it meant but she knowed a little bit what it meant.

Q. Could she read at that time? A. No, sir.

Q. And Keith was under 2 years old, wasn't he? A. Yes, sir.

Q. And he didn't care, did he? A. No.

Q. May I call you David? A. Yes, sir.

Q. David, isn't it the fact of the matter that you became upset because your mother was upset? A. No, sir.

Q. Did you know these gentlemen were from Cleveland? A. No, sir.

Q. Did you know where they were from? A. No, sir.

Q. Had other reporters been there before? A. Not as I remember, sir.

Q. Now, looking at your own picture in Exhibits 2 and 4 in front of you, is that a fair and accurate representation of the way you looked when those pictures were taken? A. What do you mean?

[79] Q. Does that look like your picture? A. Yes, sir.

Mr. Warder: Thank you, your Honor.

The Court: Redirect?

Mr. Sherman: Just one further thing I neglected to ask.

RE-DIRECT EXAMINATION OF WILLIAM DAVID CANTRELL

By Mr. Sherman:

Q. David, how did you and your mother get along at the time that Dad died? A. We got along real good.

Q. How did your mother and dad get along? A. The same way. Mom lost my dad and Dad lost my mom.

Q. How about the kids? How did they show how they felt toward the children? A. They loved us, too.

Q. How about the children toward them? A. We loved them.

Mr. Sherman: That's all.

The Court: That's all. You may be excused.

Mr. Warder: Your Honor—

[80] The Court: Yes?

Mr. Warder: May I ask a few more questions?

The Court: Yes.

RE-CROSS EXAMINATION OF WILLIAM DAVID CANTRELL

By Mr. Warder:

Q. Do you recall what the weather was like the day these gentlemen came there? A. Yes. It was damp weather. It was raining the night before and I think it rained a little bit that morning.

Q. Was it cold? A. It wasn't too cold.

Q. Had the door of the house been open before you saw the men coming across the field? A. Not as I recall. I don't remember.

Q. Do you remember that it was open when they got there or that it was open after they knocked? A. It was open when they got there.

Q. Was it open because they were coming? A. Yes, sir, I think. I don't know. Don't remember.

Mr. Warder: Thank you.

Mr. Sherman: No further questions.

[81] The Court: You may step down.

Mr. Sherman: May we proceed, your Honor?

The Court: Yes, you may.

Juanita Lee Cantrell, one of the defendants [sic] herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF JUANITA LEE CANTRELL

By Mr. Sherman:

Q. Now, would you tell us your full name, please? A. Juanita Lee Cantrell.

Q. How old are you, Juanita? You don't mind if I call you Juanita? A. No.

Q. How old are you? A. 16.

Q. What is your birth date? A. August 10, 1966.

Q. Now, you recall the occasion when the newspaper article reached your house, don't you? A. Yes, sir.

Q. Now, do you remember before that the occasion when the [82] reporter and a photographer came to your house? Do you remember them coming to the house? A. No, sir.

Q. Well, your picture was taken there, wasn't it? A. Yes, sir.

Q. Is that your picture in front of you? A. Yes, sir.

Q. Do you remember that being taken? A. Yes.

Q. Well, then who took it? A. A photographer.

Q. Then you were home when they were there, is that right? A. Yes, sir.

Q. Don't shake your head, please. Tell us in answers. A. O.K.

Q. You were there? A. Yes, sir.

Q. And you remember your brothers and sisters being—the ones that were there, you remember who it was? A. Yes, sir.

Q. You remember Dora being there, right? A. Yes, sir.

Q. Where were you when you first saw either of the men [83] that came there that day? A. I was coming from the bathroom.

Q. From the bathroom. And where were they? A. They were standing in the doorway of the living room.

Q. Was the door open or closed? A. It was open.

Q. And who else was in the living room when you first saw them? Who of the family, if anybody—who was there? A. All of them that were home.

Q. All that were home. All right. And do you recall what any one of them said in your presence? A. No, sir.

Q. Well, do you recall either one of them telling you their names? A. No, sir.

Q. Or did they ask you your name? A. No, sir.

Q. And at that time what were you wearing? A. A jumper with a sweater.

Q. Incidentally, Juanita, did you have a horse, too, at that time? A. Yes, sir, I did.

Q. And did you ride? [84] A. Yes, sir.

Q. Did you have good clothes? A. Yes, sir.

Q. And shoes? A. Yes, sir.

Q. All right. And you went to school? A. Yes.

Q. What school did you go to? A. Woods Elementary.

Q. Woods Elementary? A. Yes, sir.

Q. And were you doing all right in class? A. Yes, sir.

Q. All right. Now, when you were home and not going to school or not going out, what kind of clothes did you wear? A. Old clothes.

Q. Old clothes. Why? A. Because I don't want to ruin my good clothes playing around the house.

Q. And did you do any work around the house? A. Yes.

Q. What kind? A. I helped clean the house and the dishes.

[85] Q. Who did the cooking? A. My mother.

Q. Do you recall at any time that you missed a meal? A. No, sir.

Q. Do you recall any time that you had to be cold because you didn't have the right kinds of clothes? A. No, sir.

Q. Do you recall any time that you had to go barefoot because you didn't have shoes? A. No, sir.

Q. Or any of the other brothers and sisters? A. No, sir.

Q. Were you asked to pose when that group picture was taken? A. No, sir.

Mr. Warder: I couldn't hear her.

A. No, sir.

Mr. Warder: Thank you.

Q. Did you see the photographer taking pictures? A. Yes, I did.

Q. Did he tell you what he was going to do with them? A. No.

Q. Did he ask you whether he could do something with them? A. No, he didn't.

[86] Q. Do you remember whether mother was home that day? A. No, she wasn't.

Q. When they were there is what I mean. A. That's right.

Q. Did she come home at any time while they were there? A. No, she didn't.

Q. Did they leave any cards or identification saying who they were or where to reach them? A. No.

Q. Did they leave a telephone number? A. No.

Q. Did you actually know where they were from? A. No, sir.

Q. All right. And do you recall how long you remember that they were in your premises? A. About an hour, hour and a half, maybe more.

Q. Do you recall anybody saying, or David, particularly, saying that someone called you hillbillies? A. Yes, sir.

Q. Who? A. Nobody as I know of.

Q. Listen to the question the way I put it. I think it is a little confusing. I ask you at the time do you remember anybody [87] using the wording hillbillies about you?

Mr. Warder: Objection.

A. Oh.

The Court: Overruled.

A. No, sir.

Q. Your answer was what? A. No, sir.

Q. All right. How are you in English? A. I made A's when I was in grade school and B's and C's after I entered junior high.

Q. Where are you going to school now? A. Point Pleasant Senior High.

Q. What grade are you in? A. Tenth.

Q. How did your family get along as a family before Dad died? A. Very well.

Q. And how did you get along with Mother afterward? A. Very well.

Q. Was there any time at all that you felt there was not enough at home to take care of the family, enough of the needs of the house, food, clothing, heat? A. No.

Mr. Sherman: Cross-examine.

[88] The Court: Cross-examination, Mr. Warder?

Mr. Warder: No questions.

The Court: Thank you. You may step down.

Mr. Sherman: Now, if your Honor please, with the exhibits offered in evidence, plaintiff rests.

The Court: Mr. Warder?

Mr. Warder: I didn't hear you.

The Court: Plaintiff rested.

Mr. Warder: Oh. All right. At this time, your Honor, the defense would like to be heard on a question of law.

The Court: Very well. We will take a recess, members of the jury. During the course of the recess, of course, you will recall the Court's admonition, and that is not to discuss this matter either among yourselves or with anyone else until such time as the matter has been presented to you for your ultimate deliberation and judgment. You are to keep an open mind until such time as all of the evidence is in and the Court has instructed you on the law and its application to this case. [89] With that, you are excused to the jury room and the Court will notify you when you should return.

(Thereupon, the jurors leave the courtroom.)

(The following proceedings were had in the absence of the jury.)

The Court: Yes, Mr. Warder?

Mr. Warder: If the Court please, the defense moves the Court, in the alternative, to direct a verdict for the defendants or, in the alternative, arrest the evidence from the jury and enter judgment for the defendants.

May we consider this motion as being made separately on behalf of each defendant?

The Court: You may.

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[120] Wednesday, September 13, 1972,
10:00 A.M.

(The following proceedings were had in the absence of the jury.)

The Court: Good morning, gentlemen. Are we prepared to proceed?

Mr. Sherman: Plaintiff is ready, your Honor.

The Court: Mr. Warder?

Mr. Warder: Yes, your Honor.

The Court: The Court has reviewed the evidence that has been introduced thus far in this matter and has reviewed exhaustively the applicable law that applies to the issues raised by the pleadings. It has taken into consideration your arguments, gentlemen, on your motion, Mr. Warder, and the Court rules that your motion is granted as to the causes of action filed by Keith Elmer Cantrell, Juanita Lee Cantrell, Lolita Sue Cantrell, and Nancy Lynn Cantrell.

The remaining causes of action, therefore, will be the action of Margaret Mae Cantrell as individual and William David Cantrell, through his mother and natural guardian, Margaret Mae Cantrell.

[121] Further, the Court finds that there has been no evidence to support the charges that the invasion of privacy, if in fact an invasion of privacy occurred, was done maliciously within the legal definition of that term. Consequently, the action as it relates to punitive and exemplary damages and all allegations of punitive and exemplary damages are stricken. With that ruling, gentlemen, Mr. Warder, you may proceed with your defense.

Mr. Warder: Your Honor, did you rule as to Dora?

The Court: I ruled as to Lolita Sue, Dora Dean.

Mr. Warder: I misunderstood you.

The Court: Juanita Lee, Terry Franklin, Nancy Lynn and Keith Elmer. The only remaining plaintiffs, therefore, are Margaret Mae Cantrell, as an individual, and Margaret Mae Cantrell as the mother and natural guardian of William David Cantrell. Yes, Mr. Sherman? Do you want to address the Court?

Mr. Sherman: If your Honor please, I just wanted to—I'm sure that under the Federal [122] Rules it is not necessary for me to—

The Court: Your exceptions are noted.

Call the jury in.

(The foregoing proceedings were had in the absence of the jury.)

(Thereupon, the jurors resume their places in the jury box.)

The Court: Good morning. Please be seated. Proceed, Mr. Warder.

Mr. Warder: Would you take the stand, Mr. Arthur?

[123] **Allan A. Arthur**, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF ALLAN A. ARTHUR

By Mr. Warder:

Q. Your full name, please? A. Allan Aubrey Arthur.

Q. And your home address? A. 16000 Terrace Road, East Cleveland.

Q. Where are you employed, Mr. Arthur? A. The Plain Dealer.

Q. What is your position there? A. Assistant Sunday Editor.

Q. How long have you been with the Plain Dealer? A. My last stretch, since 1942. I was there in the late 1920's.

Q. Calling your attention to the spring and summer of 1968, what was your position at that time? A. I was Editor of the Sunday Magazine.

Q. Mr. Arthur, what was the first inclination you had that the story regarding the Cantrells was in the mill, so to speak? A. As I recall—that's four years ago—Joe Eszterhas [124] came to me, as he did every week or two, and suggested he do a story for me and he suggested going down to talk to some of the survivors of the Silver Bridge tragedy, and I agreed that it might be a good story.

Q. Did you dispatch him on that story? A. He was on a freelance basis and, as usual, I told him if he came up with something I considered worth the magazine, I would buy it.

Q. And did you buy it from him? A. I did.

Q. And to make it perfectly clear, was this work on this story within the work he did for his salary from the Plain Dealer? A. No, it had nothing to do with that.

Q. In the spring and summer of 1968, what was Mr. Eszterhas' reputation at the paper regarding accuracy and veracity? A. Well, he was known to me as the leading feature writer on the Plain Dealer at the time, and you can't be a leading feature writer without having a reputation for being accurate.

Mr. Warder: Your witness.

[125] CROSS EXAMINATION OF ALLAN A. ARTHUR

By Mr. Sherman:

Q. Mr. Arthur, may I ask you, sir, what university you attended? A. University of Michigan.

Q. When was that? A. 1926 I was graduated.

Q. And with what degree? A. A.B.

Q. Bachelor of Arts? A. Right.

Q. Did you have one of your majors, major subjects, in English? A. Yes.

Q. And did you find that this editorial background was a helpful qualification in journalism and in editing? A. Definitely.

Q. Did Mr. Eszterhas have a background of college education? A. I understand he was Campus Editor at Ohio University.

Q. You say you understand? A. Yes.

Q. Because you don't know personally, is that it? A. No, I don't know personally.

[126] Q. You never checked with him personally on his background, his qualifications? A. No, I didn't. My superiors, I assume, did that.

Q. Well, in other words, you, sir, in all fairness, as a man is assigned to your department, you assume that someone else has already taken care of that that he is a trustworthy person? A. Could we make a distinction between a man on the staff freelancing and an outsider freelancing? A. If an outsider came in and suggested doing a story for me, I would look into his background and his qualifications very carefully. In the case of the staff man, I wouldn't look into it so carefully.

Q. Because you assume someone else did? A. Right. Right.

Q. And if someone else did not, then you would be taken in? A. Yes.

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Q. Now, sir, in order to comply with the high journalistic standards that you, as an editor, would want to see kept at a large newspaper such as The Plain Dealer, you distinguish between a news article and a feature article, don't you? A. Right.

[127] Q. And, of course, you would be very careful in instructing a news reporter in what is news and a news photographer as to what is news as distinguished from feature? A. Right.

Q. Would you say, sir, that you did that in this case, that is, instructed either Mr. Eszterhas on a news story or feature story or Mr. Conway on a news photograph or feature photograph? A. I gave them no instructions in this case.

Q. Well, not only as to this story. At any time, in order to justify relying upon them, did you say to them, "Now, I want you to know the difference between a news story and what we, as editors of a large metropolitan newspaper which also carries feature stories—I want you to know the difference because you have certain rights as to one, the public has great rights as to news, and as to feature we have to watch out for the private rights of individuals"? Did you ever give them any kind of instruction?

The Court: Sustained as to form.

Mr. Sherman: Well, excuse me.

Q. I want to ask you a question in a little shorter manner. Mr. Arthur, was there any instruction given by the editors of the Plain Dealer to their reporters, [128] particularly to Eszterhas as a news reporter? A. That I could not answer.

Q. To your knowledge, you don't know of any, do you? A. I do not know.

Q. And as far as Mr. Conway as a news photographer, do you know whether he was given any instruction at all? A. No. That would be outside my province.

Q. But the product of their work would come to your attention before it came into the newspaper, wouldn't it? A. I don't understand that question.

Q. Well, the article we are here involved with of August 4, 1968? A. Yes.

Q. The spread of several pages? A. Right.

Q. That couldn't have gotten in there unless you approved it? A. Right.

Q. Is that right? A. That's right.

Q. That's a lot of space for an article. It's more than average, isn't it? A. As I recall, that was the lead article in that particular [129] issue of the magazine.

Q. May I ask you what was the circulation of your Sunday Plain Dealer that carried this Sunday Supplement? A. In 1968 I can't recall. I know it was in the 400,000 bracket.

Q. Do you know what it is now? A. About 520, I understand.

Q. How much is distributed by mail; do you know that? A. I don't know.

Q. That's in the Circulation Department, right? A. Yes.

Q. Did you ever know of your own knowledge or of policy of the newspaper to define for Mr. Conway or Mr. Eszterhas the word "privacy"?

Mr. Warder: Objection.

The Court: Overruled.

Read the question back, please.

(Thereupon, the question was read by the reporter.)

A. No, I don't. I don't know of that.

Q. Mr. Arthur, may I ask you, sir, have you yourself, as the editor, been instructed on what this word "privacy" means in law? A. By a lawyer, you mean?

[130] Q. Well, by anybody knowledgeable. A. When you are in the newspaper business, you are con-

stantly aware of the dangers of overstepping, yes, and you read, you try to keep up with the—

Q. Well, this is on your own, is that it? A. On my own. As far as I know I have never been in a legal session or something devoted to a topic like that.

Q. And you have last been with this newspaper for 30 years? A. Right.

Q. And before spent some more of your adult life with them. How many years before that? A. I have been with newspapers almost constantly since 1926.

Q. When Mr. Eszterhas approached you, sir, I believe you said in your direct examination that it was his suggestion that he go down, presumably, to the area of the Silver Bridge disaster and see the survivors or some of the survivors, is that right? A. Right.

Q. It wasn't just one survivor? A. No.

Q. And yet the article really dealt with only the family [131] of Melvin Aaron Cantrell? A. Right.

Q. You read that, you observed that before it was printed, didn't you? A. I certainly must have. My memory doesn't go back four years as far as editing the article is concerned.

Q. I was going to ask you, Mr. Arthur, do you remember editing it at all? A. I remember choosing pictures.

Q. Out of 50, you chose 5? A. I don't recall how many there were.

Q. There were five in the paper? A. Right.

Q. And that is the extent of the editing? A. Oh, no. You always edit copy automatically.

Q. As to what? A. As to style and good text.

Q. And nothing as to truth? A. I have to assume that the man who writes it tells the truth.

Q. And assume the responsibility if he didn't? A. Right.

Mr. Sherman: That's all, sir.

The Court: Redirect?

[132] Mr. Warder: No.

Mr. Edwards.

Lewis Baker Edwards, a witness called on behalf of the defendants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF LEWIS BAKER EDWARDS

By Mr. Warder:

Q. Your full name, please, Mr. Edwards. A. Lewis Baker Edwards.

Q. Where do you live, Mr. Edwards? A. 548 Wildbrook Drive, Bay Village.

Q. What is your occupation, sir? A. I am a newspaperman.

Q. By whom are you employed? A. Plain Dealer.

Q. What is your position presently? A. I am Assistant Managing Editor.

Q. And what was your position in 1968? A. It was the same, with the added title of Assistant Day Managing Editor when the duties were divided [133] between day and night people.

Q. Mr. Edwards, did you have any responsibility or interest in the hiring of Joseph Eszterhas? A. Indirectly.

Q. Are you personally familiar with his educational background? A. I am.

Q. Would you tell us what it was? A. He attended Ohio University where he took courses in journalism. I do not recall whether that was his major subject or not. And he was Editor of the Ohio University Post, the campus newspaper, and I interviewed him as a prospective employee in 1966 when I was on the campus on a recruiting mission.

Q. Now, in 1968, what was Mr. Eszterhas' reputation, insofar as you knew it, for accuracy of reporting? A. It was good.

Q. Did Mr. Eszterhas win any prizes for his reporting before August 4, 1968? A. Yes.

Q. Would you tell us what they were? A. I can recall one in particular. At this time and for a year or two following, The Plain Dealer offered two $50 prizes each month to staff members. One was **[134]** for exceptional writing and the other was for enterprize. And reporters could submit their own entries or any editors could submit them on behalf of other reporters, and these were judged by three editors picked at random on a rotating basis throughout the Editorial Department. In 1967 Mr. Eszterhas, I think, won one first $50 prize in this contest for good writing, and it was a story interviewing the survivors of the tragedy over near Birmingham, Ohio, in which a number of parachute jumpers fell to their deaths in Lake Erie.

Q. Was that the only one before August 4, 1968? A. This is the only one that I can recall.

Q. Mr. Eszterhas did cover the Silver Bridge disaster when it occurred, did he not? A. That is right. He was one of the reporters assigned there.

Q. Was there any citation or award that came from that coverage? A. Yes.

Q. Would you tell us about it? A. I can recall at least three. The first one came the following month in January of 1968 when he and another **[135]** reporter, who were first on for what we call deadline coverage of a disaster, won the $50 enterprise contest at The Plain Dealer.

The following spring the Press Club of Cleveland at its Annual Awards Luncheon gave one prize to a team of Plain Dealer reporters and editors, including Mr. Eszterhas, who was on the assignment for our what we called deadline breaking coverage of this bridge disaster, and a month or so later—I think it was in late spring of 1968—Mr. Eszterhas and the other reporter on the original assignment, Wayne Miller, shared an award given by the Ohio Associated Press Society at Columbus.

Now, this is an association of managing editors and other executives of most of the daily newspapers in Ohio which are members of the nationwide cooperative news gathering agency, the Associated Press, and the honor there was the same, for this on-the-spot deadline coverage of the Silver Bridge disaster.

Q. Did Mr. Eszterhas receive any further awards before he left the paper? A. Yes. He received another award in 1970 from this same Ohio Associated Press Society for his exclusive **[136]** story the previous November which brought to the public's attention the My Lai massacre photos, and this was another outstanding reporting award for him.

Mr. Warder: Your witness.

CROSS EXAMINATION OF LEWIS BAKER EDWARDS

By Mr. Sherman:

Q. Mr. Edwards, I heard you say that the awards that you know of that he received from—or that The Plain Dealer offered $50 awards, and one was for exceptional writing and the other one was for enterprise. Did you have anything to do with judging either one of these? A. No, sir. My job was to see that the contest was judged by others.

Q. And who appointed the judges? A. I had a hand in it in this manner. We felt that there were perhaps a dozen or more persons in editorial executive positions at the Plain Dealer capable of judging the work of

staff members, and they were usually invited. Once each month we would [137] pick three, and then another month we would go to three others, and we would try to keep it on a rotating basis so that the work was not judged by the same set each month.

Q. What qualifications were there for the judges to be judges? A. Qualifications?

Q. Yes. A. The experience you would expect from anybody in an editorial executive position. They had probably risen there because of their own competence in this field.

Q. Now, sir, these judges were not selected by a university staff or any independent organization, were they? A. No, sir.

Q. So it was what your own staff said about its own workers, is that right? A. That's correct.

Q. Exceptional writing and enterprise. You had no bonus, no awards for accuracy in reporting, did you? A. No, sir, there never was a contest based on that.

Q. You have stated what your opinion was when you hired young Mr. Eszterhas. Would you tell us what is your [138] opinion of him now? A. May I interject to say that I did not hire Mr. Eszterhas?

Q. You interviewed him? A. I interviewed him.

Q. For hire? A. That's right.

Q. Now, tell us what is your opinion of him now.

Mr. Warder: Objection.

The Court: Sustained.

Q. Mr. Edwards, did Eszterhas leave the paper or was he fired?

Mr. Warder: Objection.

The Court: Overruled.

A. He was discharged.

Q. Another word for fired, is that right? A. Yes.

Q. Do you personally, Mr. Edwards, know where he is now? A. No, sir.

Q. You know that he is a defendant also in this case, don't you? A. Yes, sir.

Q. Did you try to locate him? A. Shall I put it this way? In my position it is not my [139] job to locate him.

Q. You know that he was served personally by the Marshal in this case, don't you? A. No, sir.

Q. You were not so informed? A. I am not so informed.

Q. And I assume, sir, that as Assistant Managing Editor you had nothing directly to do with approving or disapproving of an article that was written by him; that was for the Sunday Editor, is that right? A. That's correct.

Q. Just one final question, Mr. Edwards. I would like to know, for my own information, is there a staff meeting of editors when a controversial article is brought in or one which may involve controversy, is there a staff meeting on it to see whether or not it is going to be published?

Mr. Warder: Objection.

The Court: Sustained, unless you fix the time.

Mr. Sherman: Pardon me, Mr. Edwards, and your Honor.

Q. If you will relate that to—

The Court: Rephrase your question.

[140] Q. In the summer of 1968, was there any staff of editors or board of editors at The Cleveland Plain Dealer that would review an article that might be controversial before it was published?

Mr. Warder: Objection.

The Court: Overruled.

A. I would say that there is always an occasion where editors could rule on situations of that type.

Q. But is there a specific policy group of editors that have the final word as to whether an article is or

is not going to be published because of its contents? I mean as to 1968. A. Well, it's as Harry Truman says—the buck always stops somewhere. And it could be with the editor himself; it could be with the Executive Editor or Managing Editor, depending on the nature of the story and how controversial it happened to be, how many might be involved with it.

Q. May I ask you this, if this isn't perhaps the pathway it takes: If the editor immediately above the writer gives his approval, no one else hears about it; is that right? A. I wouldn't say no one hears about it, because day in and day out from the bottom to the top there's a [141] pretty good liaison about what is getting into the paper.

Q. Well, did this article come to your attention for approval in August of 1968 before it was published? A. No, sir.

Mr. Sherman: That's all.

Mr. Warder: Thank you.

The Court: Redirect?

Mr. Warder: None.

The Court: Thank you. You may step down.

Call your next witness.

[142] **Richard Thomas Conway**, a defendant herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF RICHARD THOMAS CONWAY

By Mr. Warder:

Q. Dick, everybody knows your name but, for the record, would you state it? A. Richard Thomas Conway.

Q. Where do you live? A. 2603 Rockefeller Road, Wickliffe, Ohio.

Q. Mr. Conway, I am handing you what has been marked Defendant's Exhibit 2. Do you recognize that document? A. Yes. It's a story that Joe Eszterhas wrote.

Mr. Sherman: Objection, if your Honor please.

The Court: Approach the bench, gentlemen.

(The following proceedings were had out of the hearing of the jury.)

The Court: May I have the basis of the objection?

Mr. Sherman: If your Honor please, the exhibit is obviously a photograph, and this witness [143] has not been qualified to prove that it is an accurate photograph of any publication as of this point. I don't know if he took the photograph.

Mr. Warder: It comes off the microfilm. I will go into that.

The Court: What is the purpose of this?

Mr. Warder: The purpose of it is to show the public interest; not the truth of the contents but just the public interest.

The Court: Are you objecting to the authenticity of the article?

Mr. Sherman: Your Honor, I am an old newspaper man and I know of composition, and that is not an accurate photograph of anything because the columns there are less than the newspaper columns. And I don't know when that was set up or for what purpose or what kind of publication, and I would have to have someone else explain the difference.

The Court: Sustain the objection. He is objecting to authenticity.

Mr. Warder: May I have a chance to [144] identify it with the witness?

The Court: No, you can't. There will be no further questions as to the article. You may proffer it for whatever you think it is worth.

Mr. Warder: No, the objection is sustained as to authenticity. I want to ask the witness how it was obtained and what it was obtained from, not the content.

The Court: You may proffer.

Mr. Warder: Offer it in evidence.

The Court: Proffer.

Mr. Warder: I proffer that if the witness were permitted to testify, he would say that he obtained this exhibit from the microfilm of back editions of The Plain Dealer, the original print not being available, and it has been preserved on microfilm.

Mr. Sherman: Did he himself obtain it?

Mr. Warder: It was at his direction.

Mr. Sherman: Well, your Honor, I'm not going to strain the record in this. If he knows that this—first, identify. That's all I want you to do.

[145] The Court: I can't let him identify it if you are going to object to authenticity on technical grounds. I have got to sustain.

Mr. Sherman: Lay the groundwork is all I meant, whether he was asked to obtain it and what the system is and if he saw the original on microfilm.

Mr. Warder: He didn't see the original. I admit that.

Mr. Sherman: He didn't?

Mr. Warder: He did not see the original microfilm.

Mr. Sherman: Well, then I don't know.

The Court: Then sustain the objection.

(The foregoing proceedings were had out of the hearing of the jury.)

The Court: Thank you, gentlemen.

Mr. Warder: Your Honor, may I have a moment?

The Court: Certainly.

By Mr. Warder:

Q. Mr. Conway, you did go down on the Cantrell story which is the subject of this lawsuit, did you not? [146] A. Yes.

Q. How did you happen to go down there? A. Joe Eszterhas told me that he had talked to the Sunday Magazine and asked them if they would be interested in a story on the survivors of the Silver Bridge collapse and would I be interested in taking the photographs with that story.

Q. And how did you get down to West Virginia? A. We drove in my car.

Q. And when you went down, were you on salary? A. No, we were on our—my days off and Joe's days off.

Q. And how did you expect to be paid? A. On publication of the article.

Q. In other words, if it's not published, no pay; is that correct? A. Correct.

Q. Now, how did you find the Cantrell residence? A. We stopped at the Point Pleasant Newspaper and asked directions there and again at a grocery store further down the road, south of Point Pleasant, and asked directions again.

Q. And when you arrived at the Cantrell property, how far did you park your car from the home? A. We had to park on the road. We couldn't get on the [147] property because the bridge was broken.

Q. You mean on the state highway? A. The road that runs in front of the Cantrell property.

Q. And as you approached the property, the house, do you recall the first person you saw and the circumstances? A. We didn't see anybody as we approached the

house itself. We didn't see anybody outside. I saw somebody in the window who I couldn't tell who it was at the time.

Q. Will you tell us what the weather was like? A. It was a cold, rainy day.

Q. And when you got to the house, would you tell us what happened? A. As we approached the house, before we actually knocked on the door, someone opened the door. I believe it was David. And at that time Dora came to the door. We asked if Mrs. Cantrell was home. She said no. Joe identified himself and introduced me. Joe said, "I'm Joe Eszterhas of The Plain Dealer in Cleveland. I'm a reporter. And this is Dick Conway, one of our photographers. We would like to talk to you, if it is possible, and take some pictures."

Q. And were there any objections? **[148]** A. No. We were invited into the home.

Q. Were you advised at any time that the mother was not there? A. We were told at the time that we got to the home that the mother was not home.

Q. And what was your response to that? A. We were sorry that she wasn't there because we wanted to talk to her.

Q. Was there any reply, though, any conversation about her absence that you can recall? A. I believe that Dora said she wasn't at home, that she was in town either shopping or visiting with somebody.

Q. Now, you took some pictures, did you not? A. Yes.

Q. It is in the record, but how many did you take? A. 50.

Q. Where were they taken? A. In the house and outside the house.

Q. Was there any objection made to your taking the pictures? A. No.

Q. Did you from time to time ask the people being photographed to take a position where you could take their pictures?

[149] Mr. Sherman: Objection, as leading.

The Court: Cross-examination. Overruled.

Mr. Sherman: It's direct examination.

Mr. Warder: No, no, your Honor,—

The Court: I'm sorry.

Mr. Warder: But I don't think it is leading. It does not suggest the answer.

The Court: I'm sorry. Read the question back, please.

(Thereupon, the pending question was read by the reporter.)

The Court: Sustain the objection as to form.

By Mr. Warder:

Q. How did you go about posing the subjects for photography? A. I asked them to pose for me.

Q. Mr. Conway, why didn't you ask the subjects of the photography to clean up, wash their faces or brush their hair? A. Because I photographed what I saw. It wouldn't give a true representation of the time that I was there if I changed anything at that time.

Q. During the time that you were there, was any objection **[150]** made by anyone, first, to your being there? A. No.

Q. Second, to your taking the pictures? A. No.

Q. Now, when you and Mr. Eszterhas left the premises, did either of you leave any written identification? A. Joe wrote his name on his note pad, and I don't know if my name was on there or not, but Joe wrote his name out and telephone number and handed it to Dora and he said, "Here's my name and telephone number. Have your mother call me."

Mr. Warden: Your witness.

CROSS EXAMINATION OF RICHARD THOMAS CONWAY

By Mr. Sherman:

Q. Mr. Conway, how old are you now, sir? A. 31.

Q. And, of course, you are also a defendant in this case? A. Yes, sir.

Q. Mr. Conway, your testimony was taken by deposition on May 31, 1969; is that right? A. Yes.

Q. In the offices of Mr. Warder? [151] A. Yes.

Q. By court reporter? A. Yes.

Q. And did you read the transcript of your testimony since then? A. Yes.

Q. When? A. Last week.

Q. And did you find any inaccuracies in the reporting? A. I'm sorry, in the reporting of the deposition?

Q. Yes. A. No.

Q. You said that you went down because Mr. Eszterhas asked you to, is that right? A. Right.

Q. And was that to interview just the Cantrell family or the survivors? A. It was the survivors, but I knew before we left or at the time we were leaving that we were going to the Cantrells.

Q. Yes, but did you, as was suggested by Mr. Warder in his opening, did you go down to interview the survivors of the disaster or their families? A. Yes.

[152] Q. Did you in fact interview anybody other than take pictures at the Cantrell home? A. No.

Q. As a matter of fact, did you interview anybody? A. No.

Q. Did you ask any questions at all yourself? A. I don't remember. I don't believe so. I'm not a reporter. I'm a photographer.

Q. Well— A. I didn't conduct an interview.

Q. And you didn't ask any questions? A. I might have asked questions. I don't remember.

Q. Now, sir, I want to show you a photograph which we have identified as Plaintiffs' Exhibit 4, and I ask you, sir, to look at that particular photograph. Who is in that photograph? A. Dora and David.

Q. Now, that's outside the house, right? A. Yes.

Q. Did they pose for that? A. Yes.

Q. You are sure? A. Yes.

Q. Now, did you ask them to start walking toward you and [153] then you took that photograph? A. Yes.

Q. I ask you, sir, whether you were not asked the following questions and gave the following answers under oath at page 41—excuse me—yes, at line, 8, whether the following question was asked: "Now let's take a look at C-28"—and that is C-28, isn't it? A. C-69.

Q. It's the same as C-28, isn't it? It's a similar photograph, isn't it? A. I don't know.

Q. Well, we will get C-69. A. This is C-69, sir. Is this the number here at the bottom?

Mr. Sherman: We want to get C-28 then. I'm sorry. This is C-28.

(Thereupon, Plaintiffs' Exhibit 3 was marked for identification.)

Mr. Sherman: If your Honor please, we have had now marked for identification Plaintiffs' Exhibit 3, instead of 4, as C-28.

By Mr. Sherman:

Q. And that is a photograph of whom? [154] A. Dora.

Q. Did she pose for that? A. Yes.

Q. Did you ask her to? A. Yes.

Q. Are you sure? A. I asked before I photographed her, while I was in the house, if she would come outside

for a picture. She was going to show us her duck or goose.

Q. Now, I ask you whether you weren't asked the following questions and gave the following answers with regard to that photograph:

"Question: Now let's take a look at C-28. Why did you tell Adore to stand over near that barn or shack?

"Answer: I didn't tell her.

"Question: You just happened to see her standing there?

"Answer: She took us outside to show us the duck that she had.

"Question: But you saw something more valuable as a news story in that pose, didn't you? That's a kind of news story or feature story, rather. This was no news story, was it? It was a feature story, **[155]** wasn't it?

"Answer: It was a news feature story."

Weren't those the questions and answers you gave?

A. I believe so.

Q. So you didn't tell her to pose for that, did you?

Mr. Warder: Objection.

The Court: Sustained.

Q. Did you use the word "pose" to her before she went out there to show you her duck, which turns out to be a goose? A. I asked her if we could photograph her with her duck. She led us outside and that's where I took the picture. The duck ran away.

Q. Now, Mr. Conway, you say you were taking these pictures for Joseph Eszterhas, right? A. No, I wasn't taking them for Joseph Eszterhas. I was taking them as an assignment—as a freelance assignment for The Plain Dealer. I was with Mr. Eszterhas

Q. He wasn't your employee, was he? A. No, sir.

Q. The Plain Dealer was your employer, weren't they? A. At that time they weren't really my employer because it was my day off.

Q. You weren't taking these pictures for yourself, were you? **[156]** A. No, sir.

Q. Or for Mr. Eszterhas? A. No, sir.

Q. You were taking them as a photographer for The Cleveland Plain Dealer, weren't you? A. I was taking them as a freelance photographer for The Cleveland Plain Dealer.

Q. Let's get this straight. Were you taking these for yourself to make some money on? Is that what you are saying? A. Yes, sir.

Q. You were taking them on your own, then? A. Yes, sir.

Q. Then I will ask you whether or not you weren't asked the following questions and gave the following answers at page 24 of the deposition, line 12:

"Question: And any photograph you did take, sir, did you take them on your own or did Mr. Eszterhas ask you to?

"Answer: I took them on my own.

"Question: And under general instructions from the City Desk, you took whatever you felt as a photographer might be newsworthy?

"Answer: I don't understand the question.

[157] "Question: Well, did you take it merely as a curiosity-seeker or did you take it as a photographer for The Cleveland Plain Dealer under your general instructions and authority?

"Answer: I took it as a photographer for the Plain Dealer."

Do you remember that?

A. Yes, sir.

Q. And, of course, actually, your work product was printed to the extent that the editors collected your photographs and put them in the article on August 4 of 1968; they were actually the pictures you took at the Cantrell home, weren't they? A. Yes, sir.

Q. Mr. Conway? A. Yes, sir.

Q. Can you now tell the Court and jury why you didn't wait for Mrs. Cantrell before you went around their property taking pictures and preparing a story for sale to The Plain Dealer? A. We didn't know where Mrs. Cantrell was, how long she would be.

Q. Were you in a hurry? A. We weren't in a hurry as much as that it's a long drive **[158]** back from there to Cleveland. We left information with the family to have Mrs. Cantrell call us.

Q. You were there about an hour, hour and a half, weren't you? A. Approximately.

Q. And for that hour or hour and a half, is that why you went down there altogether, just for that hour or hour and a half? A. We went down to do a story on the survivors.

Q. Let me ask you this, Mr. Conway: You knew from the records in your files that there were 44 deaths from the Silver Bridge disaster, didn't you? A. I didn't know the exact number, but I know there were several people.

Q. You know that it was over 40, didn't you? A. I believe I do.

Q. And didn't you have available the names and addresses of some of the other families? A. I did not.

Q. Did Mr. Eszterhas? A. I don't know.

Q. Well, it was easy—you went to the Point Pleasant Paper to get directions, didn't you? **[159]** A. Right.

Q. So it wasn't very far away to go back and get the directions to somebody else's home, was it? A. I don't suppose it would have been.

Q. So when Mrs. Cantrell wasn't home, why didn't you go some place where a parent was home to find out what you wanted to find out?

Mr. Warder: Objection.

The Court: Sustained.

Q. You didn't take the picture in the kitchen, did you? A. No, sir.

Q. Or in a bedroom? A. No, sir.

Q. Or of a refrigerator? A. No, sir.

Q. Or of a storage room where food was stored? A. No.

Q. Nor of the television set, did you? A. No.

Q. Did you know that they owned 74 acres there?

Mr. Warder: Objection.

The Court: Overruled.

A. No.

Q. Well, did you ask whether they rented this house or **[160]** owned it? A. I didn't ask.

Q. You didn't ask anything, did you? A. Not that I recall. I didn't ask that. I know that for sure.

Q. Let's get this straight. You didn't ask any questions, did you? A. I may have. I don't believe I did.

Q. Well, maybe we can help clear it up. At page 36. I want to ask you again, sir, whether you can recall the following questions and giving the following answers under oath, at line 13:

"Now, there's an automobile in C-6. It's a dark polished little car. Is that your Toyota?

"Answer: No.

"Question: Do you know whose that is?

"Answer: No.

"Question: Did you ask?

"Answer: I don't ask questions. I did not ask, no.

"Question: You answered that last question by saying you do not ask questions. Can I now get this

on the record that you didn't ask any questions of any of the children while you were there?

[161] "Answer: I can't remember.

"Question: At any rate, let's put it this way, did you ask any questions for which you noted answers as a job for reporting?

"Answer: I can't remember."

Remember that?

A. Yes.

Q. And it is accurate, isn't it? A. Yes.

Q. Just for the jury's information, and the Court, did you go to college? A. No, I didn't.

Q. Were you ever taught anything about photography at the newspaper or anywhere else? A. Yes.

Q. Where? A. Well, I didn't go to photography school. My learning was on the job.

Q. So how you take a picture and how you use a camera, you became pretty good at it, right? A. Yes.

Q. But did you ever get any instruction at all as to what is a news photograph or a feature photograph? A. Instructions defining each one?

[162] Q. Yes. A. No, sir.

Q. When you were going to the Cantrell home, you knew you were going to visit private property, right? A. Yes.

Q. Did you presume that someone in the newspaper had made arrangements for you to visit private property at the Cantrell home? A. I assumed that Mr. Eszterhas had tried to get in contact with the Cantrells.

Q. And if not Eszterhas, the City Editor? A. No. We weren't dealing with the City Editor. We were dealing with the magazine.

Q. Well, I ask you again whether this refreshes your recollection, at page 10 of your sworn deposition, the following questions and the following answers:

"Question: And when you are on private property, who makes the arrangements for you to get on that property?

"Answer: Either the City Desk or the reporter.

"Question: But not you?

"Answer: No, sir.

"Question: So that you assumed that the City Desk, if they tell you to go on to private property and take [163] someone's photograph, you assume that the proper arrangements have been made, is that right?

"Answer: That is correct."

Mr. Warder: Objection.

The Court: Overruled.

Q. Is that correct? Remember that? A. Yes.

Q. And is it correct that those were asked and those were the answers you gave under oath? A. Exactly.

Mr. Sherman: No further questions.

The Court: Redirect?

Mr. Warder: No further questions.

The Court: Thank you. You may step down. Call your next witness.

Mr. Warder: Your Honor, authenticity having been stipulated, I offer Defendants' Exhibits 3 and 4.

The Court: Mr. Sherman?

Mr. Sherman: Objected to as incompetent, irrelevant and immaterial.

The Court: Approach the bench, gentlemen.

[164] (The following proceedings were had out of the hearing of the jury.)

The Court: Mr. Warder, what is the purpose of offering Exhibit 3 which, obviously, is a copy of a complaint filed in the United States District Court for the Southern District of West Virginia, Charleston, filed by essentially the same plaintiff here against the same defendant?

Mr. Warder: Your Honor, in that complaint and in the complaint in this case, the allegation is made that the publication was made for the purpose of affecting the outcome of a pending action for wrongful death. It is in both complaints. If your Honor will look at the dates of the forms on the two complaints, they were filed simultaneously.

The Court: What complaints are we talking about?

Mr. Warder: The complaint in Charleston against—

The Court: Is filed simultaneous with Exhibit 4?

Mr. Warder: With respect to each other, yes. Therefore, the article could not have been **[165]** published for the purpose of affecting the outcome of this case in Exhibit 4.

The Court: Well, there is no evidence in this case to that.

Mr. Sherman: No evidence at all.

The Court: Consequently, I see no reason to refute it. It will not be a part of the charge.

Mr. Warder: May I offer a second ground for the admission, your Honor?

The Court: Yes.

Mr. Warder: Your Honor, as to Exhibit 4, we have an issue here of whether the matters were matters of public interest. This demonstrates that six years has made it a matter of public interest, that it is a matter of public interest.

The Court: I'm going to sustain the objection as to both exhibits.

You may proffer them, Mr. Warder.

Mr. Warder: I certainly proffer them.

I don't have to take an exception, do I?

The Court: Yes.

Mr. Warder: I do.

The Court: No, I say your exceptions will be noted.

[166] Mr. Warder: I still want to get in Exhibit 4. I had not anticipated the technical objection. I am trying to secure the person that ran the microfilm to testify as to its authenticity. Could we have a recess?

The Court: Yes. We can have a recess, and perhaps this would give us an opportunity of reviewing the charge with counsel, and we will resume at 1:30.

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[Note: Thereafter the Court read to counsel the charge as intended to be given.]

[191] The Court: Mr. Warder, anything?

Mr. Warder: Your Honor, two matters. **[192]** Your charge contains nothing on the common law privilege of newsworthiness that I heard.

Mr. Sherman: That's the First Amendment.

Mr. Warder: No, it's a little different. Going back to Brandeis and Warren's article. I have seen both admit if the matter is newsworthy, get away from the constitutional protections, that is a wholly different thing.

The Court: Fine. You may note your exception.

Mr. Warder: Then there is nothing in the charge that a person may waive his right to privacy. I am thinking about the evidence that would let the jury conclude she knew immediately who had been there. The jury can find this. That she did not protest for two and a half months. Her answer to the question that it wasn't being publicized that bothered her, it was what was said.

The Court: Well, I will take under consideration your request as it relates to waiver. Anything further?

Mr. Warder: I would like to know the answer before I argue. It makes a very great difference.

[193] The Court: Well, I will have to check the law on it, Mr. Warder. I can't answer that offhand.

Mr. Sherman: May I respectfully just comment on that to this respect? I'm afraid that what Mr. Warder is asking the court's taking a specific question and answer out of the entire context and risking—that it is an overemphasis on testimony aside from other parts of the testimony, stating what Mr. Warder asks the Court to include in the charge, that a person may waive a right of privacy if the evidence, any evidence, has been so asserted, but there is no defense raised that she waived it at any time. It's not been pleaded.

Mr. Warder: May I answer that, your Honor?

The Court: Certainly.

Mr. Warder: Take the simple case. I actually had this case. Curtis Publishing Company sends a photographer out to Jones & Laughlin. They want to do a story on the steelworkers. They say, "Get us somebody that's photogenic." That guy not only poses for the publishing company but they put him on the cover, and he brings a lawsuit. He's [194] waived his right of privacy. This is the situation I am thinking of.

Mr. Sherman: Yes, but that is—

Mr. Warder: The testimony here, it's not just one question and answer. It's the testimony that Eszterhas left his name and telephone number and asked Mrs. Cantrell to call him; they introduced themselves by name and as reporters from The Cleveland Plain Dealer. I appreciate there is evidence to the contrary and the jury doesn't have to believe this

evidence, but if they believe it, there is a waiver of privacy. Not of libel and slander.

The Court: There cannot be a waiver of privacy where the invasion of privacy results from knowingly publishing falsehoods and recklessly printing and publishing falsehoods.

Mr. Sherman: Even the truth.

Mr. Warder: I would agree to this.

The Court: All right. If we were applying Hill in its strictest sense, which we are, and if the invasion of privacy can result only from the knowingly printing of falsehoods, or recklessly, and, in any event, if the overt act is the publication, how can she waive something [195] that she doesn't know that is going to happen until the article, or the context of the article, until after she receives it?

Mr. Warder: I am thinking of the classic right to privacy. Let me start by saying I do not regard the Hill offense—defense as being the exclusive defense. If your Honor is prepared to charge the jury that in this case that is the only possibility of recovery, then I will withdraw my demand.

The Court: That is, in effect, what I have charged.

Mr. Warder: What I am thinking is this. She has testified about being embarrassed by the article. I am thinking this is one facet. But insofar as her strict right to be let alone—and your Honor has charged on that on the right of privacy and to be let alone—

The Court: That's right.

Mr. Warder: This can be waived.

The Court: I have defined what the right of privacy is, but then I have in the charge incorporated the elements that constitute the invasion, which are the elements that were set forth in Time v. Hill.

[196] Mr. Warder: Right.

The Court: In no uncertain terms. And since that is the only authority where invasion of privacy is discussed, I find that the language is rather specific as to what the Court's holding is, and that is on page 542. The majority says:

"We hold that the constitutional protections for speech and press preclude the application of the new statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."

Now, forgetting the reference to the statute, the broad language of the decision is that the element of an invasion of privacy are that the defendants published the report with knowledge of its falsity or in reckless disregard of the truth. That is the only standard that is set.

And under the facts of this case, where the woman or the boy were certainly not aware of the fact of the contents of the article until it was actually printed, there couldn't be a waiver until they saw it.

[197] Mr. Warder: There can't be a waiver of the falsehood. There can be a waiver of the right to remain anonymous.

Mr. Sherman: Oh, well—

The Court: We have already gone into the question of this business of anonymity, which the Court states in its decision there is no complete anonymity in our society.

Mr. Warder: You have done that. That's correct.

The Court: I have covered that aspect of it. So I am going to overrule both of your motions. You may take your exceptions as to those two aspects.

and we have your special charge here, also, which I believe is covered by the general charge, and I will overrule this request and you may take your exception as to that. Is there anything else?

Mr. Warder: That's all the notes I have.

The Court: Thank you, gentlemen.

Mr. Sherman: Thank you, your Honor.

Mr. Warder: Thank you.

Mr. Sherman: It's been a pleasure [198] working with you, regardless of the outcome.

Mr. Warder: It surely has.

(Thereupon, court recessed for the lunch period.)

[199] Wednesday, September 13, 1972, 1:50 P.M.

(The following proceedings were had in the absence of the jury.)

The Court: Gentlemen, there remains outstanding at least one item that the Court is aware of, namely, the introduction of an exhibit. I understand that you two gentlemen have resolved this matter?

Mr. Sherman: We have, your Honor. We have stipulated that Exhibit No. 4 for the defendant may be withdrawn and another substituted in its stead and offered into evidence without objection.

Mr. Warder: That's my understanding.

The Court: Very well. It may be admitted.

With that, Mr. Warder, do you have anything further?

Mr. Warder: It was Exhibit 2, not 4.

Mr. Sherman: I beg your pardon. My error.

Mr. Warder: Just one thing, your Honor. I think I led him into that error this morning. My tender should be of Exhibits 3 and 4 instead of [200] 2 and 3, which were rejected.

Mr. Sherman: I recall that, yes

The Court: The exhibits that the Court rejected were 3 and 4?

Mr. Warder: Right. And I think I referred to them as 2 and 3.

Mr. Sherman: Yes.

The Court: Well, the record will stand corrected. In any event, they are copies of complaint of the Southern District of West Virginia.

Mr. Sherman: And Columbus.

Mr. Warder: And with that, your Honor, the defense rests.

The Court: The defendants having rested, Mr. Sherman?

Mr. Sherman: No rebuttal, your Honor. The plaintiff rests.

The Court: You have no rebuttal. Very well. I take it we are then prepared to proceed to closing arguments?

Mr. Sherman: Yes, your Honor.

The Court: And by agreement of counsel, at the urging of the Court—

Mr. Sherman: Advice of the Court.

[201] The Court: —we have limited ourselves to one-half hour each. Mr. Sherman, since you have the right to open and close, are you desirous of having the Court call your time at any specific point in your argument?

Mr. Sherman: If your Honor please, I have a wristwatch and I usually keep myself pretty well posted, but if I should by any chance forget myself, being my age and that is possible, I would appreciate a reminder from the Court, but very gently.

The Court: After 20 minutes?

Mr. Sherman: At 20 minutes.

The Court: At 20 minutes?

Mr. Sherman: Yes, your Honor.

The Court: Very well. With that, we are prepared to bring the jury in.

(The foregoing proceedings were had in the absence of the jury.)

(Thereupon, the jurors resume their places in the jury box.)

The Court: Members of the jury, in your absence counsel have informed me that both **[202]** sides have rested their respective cases. Therefore, we are at that point in the proceedings where counsel will be permitted the privilege of addressing you in their closing arguments.

Those of you that have had previous jury service, you know that the plaintiffs' counsel has the right of opening, followed by the defense counsel's opportunity to make his closing statement which will conclude the defense counsel's addressing you, and thereafter counsel for the plaintiff will be permitted a short period of time to close. Of course, at the closing of both arguments, the Court will instruct you as to the law.

The case in its present posture has resolved itself to two remaining plaintiffs. Those plaintiffs are Margaret Mae Cantrell, as an individual, and also as the mother and natural guardian of William David Cantrell. The action as to the other named plaintiffs —I should say those other remaining—the other plaintiffs have been dismissed from the action.

With that brief explanation, Mr. Sherman, if you are prepared to proceed, you may address the jury.

[203] (Thereupon, opening arguments on behalf of the plaintiffs were presented to the jury by Mr. Sherman.)

(Thereupon, closing arguments on behalf of the defendants were presented to the jury by Mr. Warder.)

(Thereupon, closing arguments on behalf of the plaintiffs were presented to the jury by Mr. Sherman.)

[204] CHARGE OF THE COURT

BY KRUPANSKY, J.:

Members of the Jury, you have heard the evidence and arguments of counsel and it is now the duty of the Court to instruct you on the law which applies to this case.

The Court and the jury have separate functions. The jury decides the disputed fact and the Court provides the instructions of law. It is your sworn duty to accept the instructions of the Court and to apply the law as it is given to you. You are not permitted to change the law nor to apply your own conception of what you think the law should be.

These instructions are for your guidance in arriving at a verdict in this case. They are not intended to reflect any opinion on the part of the Court. Do not search for any hidden implication but, rather, apply these principles wisely and impartially.

You are not to single out one instruction alone as stating the law but you must consider the instructions in their entirety. Neither are you to be concerned with the wisdom of any rule of law. Regardless of your personal interpretation of the law, it would be a violation of your [205] sworn duty to arrive at a verdict except by applying the law to the facts as given in these instructions by the Court.

In every lawsuit the witnesses, the lawyers, the Judge and the jury must participate in accordance with established rules. I now instruct you as to the rules of law that will guide and govern your deliberations.

You have been selected to serve as jurors in this case to consider and decide the issue of fact presented by the pleadings and the evidence. Each of you has taken an oath to perform these duties impartially, without bias or prejudice to either party or any of the parties to this action. The law, the parties, the Court, counsel and the public expect that you will honor your oath and carefully and impartially consider all of the evidence presented in this case, accept and apply the law as instructed by the Court, and return a just verdict, regardless of the consequences. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion.

This case should be considered and decided [206] by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as an individual. The law is no respecter of persons. All persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

This action, in its present posture, is for compensatory damages instituted by the plaintiff, Margaret Mae Cantrell, against defendants, Forest City Publishing Company, an Ohio corporation, with its principal office in Cleveland, and against Joseph Eszterhas and Richard T. Conway.

The plaintiff, Margaret Mae Cantrell, brings this action individually and on behalf of the plaintiff, William David Cantrell, a minor, and she brings it as his mother and natural guardian.

Briefly summarized, the complaint asserts that Margaret Mae Cantrell is the widow of Melvin Aaron Cantrell, deceased, and the mother of the minor plaintiff; that the defendant, Forest City Publisher of The Plain

Dealer, a newspaper of general circulation, and that at all times [207] material to this action defendants Joseph Eszterhas and Richard T. Conway were employed by the corporate defendant as a news reporter and a photographer, respectively.

It is charged that on or about the 4th day of August, 1968, defendants did publish or cause to be published a five-page feature article together with photographs depicting the plaintiffs as hillbillies who were unclean, impoverished, backward, ignorant and unfeeling; it is further charged that the article and photographs were published without the plaintiffs' consent or approval, all in violation of their individual rights to privacy, that the publication and resulting invasion of plaintiffs' privacy was an unwarranted intrusion into their private affairs with which the public had no legitimate concern, so as to cause them mental suffering, shame, embarrassment, contempt, ridicule and humiliation as persons of ordinary sensibilities and derived from the publication of knowing or reckless falsehood.

For the joint answer to the complaint, defendants, individually and collectively, admit, number one, the existence of the Forest City [208] Publishing Company; (2) the employment of defendants Eszterhas and Conway as reporter and photographer; however, the defendant Forest City Publishing Company denies that at the time here in question the defendants Eszterhas and Conway were acting within the scope of their employment. The defendant, Forest City Publishing Company, admits publishing The Plain Dealer, a newspaper of general circulation. The defendants admit the relationship of the plaintiffs, admit the publication of the feature article of August 4, 1968, containing references to the plaintiff, and admit that the article was published and appeared as a feature in the Sunday Magazine section of The Plain Dealer.

Further answering, the defendants deny their actions were unwarranted or done knowingly or with reckless intent to injure the plaintiffs or either of them. They deny that the article was or was intended to be biased, that the article was distorted or contained untruths or was in any way sensationalized. Defendants further deny that they intentionally or otherwise invaded the privacy of the plaintiffs or intruded into their private activities, and generally deny all [209] the charges of the complaint not specifically admitted to be true.

Further answering, the defendants assert that at the time of the publication they believed the article to be factually correct and true, that at the time of the publication plaintiffs were newsworthy public figures because of their tragedy in connection with the collapse of the Silver Bridge spanning the Ohio River; thus, the defendants were privileged to publish the article.

Briefly summarized, the claims of the parties are these:

(1) Did the defendants, individually or collectively, invade the privacy of the plaintiffs or either of them?

(2) If so, did the acts of the defendants, individually or collectively, result in damage to the plaintiffs or either of them?

An actionable invasion of privacy as alleged in the complaint derives from a wrongful intrusion into an individual's private activity.

The right of privacy is the right of an individual to be let alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public into matters [210] with which the public is not necessarily concerned. It is the unwarranted appropriation of an individual's personality, the publicizing of an individual's private affairs with which the public has no legitimate concern in such a manner as to outrage or cause mental

suffering, shame or humiliation to a person of ordinary sensibilities.

The First Amendment to the Constitution provides for the protection of certain rights supremely precious in our society by guaranteeing freedom of the press, speech, assembly and religion. The freedoms guaranteed by that amendment are essential freedoms in a government like ours. That amendment was deliberately written in language designed to put its freedoms beyond the reach of government to change while it remains unrepealed. These guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

Exposure of self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an [211] essential incident of life in a society which places a primary value on freedom of speech and press.

In this context, sanctions against either innocent or even negligent misstatements would present a grave hazard of discouraging the press from exercising the constitutional guarantees and are, therefore, not actionable under law. However, the constitutional freedoms guaranteed by the First Amendment do not tolerate calculated falsehoods within the veil of its protection of privilege. Calculated falsehoods do not, therefore, come within the immunity of the First Amendment rights of freedom of press and speech.

To summarize, the constitutional protection for speech and press preclude redress for false reports of matters of public interest in the absence of proof that the defendants published the report with knowledge of its falsity or in reckless disregard of the truth.

It is the conduct of the parties prior to and at the time of the incident that gives rise to the issues in this case.

In a civil action, the persons who assert that certain facts exist must prove those facts [212] by a preponderance of the evidence. This obligation is known as the burden of proof.

Thus, in this case the burden of proof is upon the plaintiffs to prove by a preponderance of the evidence their assertions of an invasion of privacy, the elements of which are:

(1) An unwarranted and/or wrongful intrusion by the defendants into their private or personal affairs with which the public had no legitimate concern.

(2) Publishing a report or article about plaintiff with knowledge of its falsity or in reckless disregard of the truth.

(3) Defendants' acts of publishing a report or article about plaintiffs with knowledge of its falsity or in reckless disregard of the truth caused plaintiffs injury as individuals of ordinary sensibilities and damage in the form of outrage or mental suffering, shame or humiliation.

Preponderance of the evidence, as herein used, simply means the greater weight of the evidence. The greater weight of evidence is evidence that outweighs or overbalances in your mind the evidence opposed to it. It means evidence that is more probable, more persuasive, [213] and of greater probative value. It is the quality of the evidence that must be weighed, and quality may or may not be identical with quantity, that is, with the greater number of witnesses.

In determining whether or not an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it. If the evidence is equally

balanced or is in equipoise, or if you are unable to determine which side of the issue has the preponderance, then the party who has the burden of proof has not established such issue by a preponderance of the evidence.

You must determine the probablility of the truth of each issue. If an issue may reasonably be determined either way or in two or more ways, you cannot resort to guesswork, conjecture or possibility.

An inference is a reasonable deduction of fact which logically follows from other facts established by the evidence.

The existence of an inference or presumption does not change or shift the burden of proof from [214] one party to another. The inference or presumption must be weighed along with all the evidence to determine if the issue to which it applies has been established by a preponderance of the evidence. You are permitted to make any logical and immediate inference from the facts which you find are established or proved herein as required.

One inference cannot be predicated upon any other inference; however, a given state of facts may give rise to separate inferences drawn independently from the same evidence.

The weight of any inference, as well as the weight of evidence required to overcome or to dispel it, is for the determination of the jury.

The evidence in this case includes all the testimony received from the witnesses, the exhibit accepted as evidence by the Court, and all admissions or agreements made for and during this trial.

The evidence does not include any statement of counsel made during the trial unless such statement was an admission or agreement admitting certain facts. Thus, opening statements and closing arguments of counsel are designed to assist you but are not evidence except to the [215] extent that they may contain admissions of fact.

Statements that were stricken by the Court and which you were instructed to disregard are not evidence and must be treated as though you never heard them. You must not speculate as to why an objection was sustained as to any question or what the answer to such question might have been, because these are questions of law and rest solely with the Court.

You must never assume or speculate on the truth of any suggestion or insinuation included in the question put to a witness by counsel unless it was confirmed by the witness.

Evidence is either direct or circumstantial. Direct evidence is a recital of facts by witnesses who have actual knowledge of the incident. Circumstantial evidence is evidence of facts or circumstances from which the jury may infer other connected facts which immediately and reasonably follow according to common experience.

To determine the preponderance of the evidence, you must decide what weight shall be given to the evidence. To do this you must determine the credibility of the witnesses.

In testing the credibility of witnesses, you [216] may consider the behavior of the witness upon the witness stand; their manner of testifying; the reasonableness and the probability of their testimony; the opportunity they had to see, hear, and know the things about which they testified; the accuracy of their memory; their candor or lack of candor; their intelligence, interests and bias, if any; together with all of the circumstances surrounding their testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper.

While the burden rests upon the party who asserts the affirmative of an issue to prove the claim by a preponderance of the evidence, this rule does not require

such degree of proof as produces absolute certainty, since in human affairs absolute certainty is seldom possible.

To assist you in your deliberations, you must understand the meaning of certain terms.

An act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Recklessness implies a higher degree of culpability than negligence. Recklessly means [217] wantonly, with indifference to consequence.

Since a corporation can act only through its officers or employees or other agents, the burden is on the plaintiff to establish by a preponderance of the evidence that the actionable wrong, namely, the invasion of plaintiffs' privacy, resulted from acts of employees or agents of the defendant and caused injury and damage suffered by the plaintiffs.

Any act of an employee or agent, to become the act of the corporation, must be performed by the employee while acting within the scope of his employment.

Here, defendant, Forest City Publishing Company, has admitted the employment of Richard T. Conway and Joseph Eszterhas but asserts that they were not acting within the scope of their employment when Eszterhas conducted the interviews and wrote the article and Conway took the photographs here in issue.

Consequently, knowledge that defendants Eszterhas and Conway may have had as to the truth or falsity of the facts reported in the article is not imputable to it, namely, Forest City Publishing Company nor is any reckless [218] disregard of truth by them, if in fact such reckless disregard of truth existed in the article, nor is it imputable to the corporate defendant, Forest City Publishing Company.

The Court charges you as a matter of law that before any acts or knowledge of Joseph Eszterhas or Richard T.

Conway may be imputed to the defendant, Forest City Publishing Company, the plaintiffs must prove by a preponderance of the evidence that defendant, Forest City Publishing Company, had actual knowledge of those acts and information or that Conway and Eszterhas were acting within the scope of their employment when they performed the acts or acquired the information.

I should advise you that whenever I use the expression "if you find" in this charge in relation to a conclusion arrived at by the jury, it always means if you find by a preponderance of the evidence, as I have heretofore defined that term.

Thus, if it be your conclusion and determination that plaintiffs have failed to prove by a preponderance of the evidence that defendants invaded the privacy by publishing a report or [219] article about them with knowledge of its falsity or in reckless disregard of the truth, you need not deliberate further and you will return a verdict in favor of the defendants.

If, however, it be your conclusion that plaintiffs have proved by a preponderance of the evidence that the defendants published the article with knowledge of its falsity or in reckless disregard of the truth, you will then consider and determine whether such acts caused injury or damage to the plaintiffs.

If you find that the plaintiffs have failed to prove by a preponderance of the evidence that the acts of the defendants resulted in or caused injury or damage to plaintiffs, you need not deliberate further and your verdict will be in favor of the defendants.

If it be your conclusion that plaintiffs have proved by a preponderance of the evidence that defendants published the article of August 4, 1968, with knowledge of its falsity or in reckless disregard of the truth and which acts resulted in injury and damage to the plaintiffs, then in that event your verdict will be in favor of the plaintiffs and

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you will proceed to award whatever [220] sum of money that fairly and reasonably represents the damages, if any, which plaintiffs have proved by a preponderance of the evidence.

Damages must be proved as any other issue in this case; that is, the plaintiffs must prove by the preponderance of the evidence the nature and extent of their damages.

If your verdict is for the plaintiffs and you find they are entitled to an award of damages, you will determine from the preponderance of the evidence the amount of money which will fairly compensate them for actual injury caused by the defendants.

In determining the measure of damages, if any, you shall take into consideration the nature and extent of the plaintiffs' injury or damage, the effect upon their health, the outrage, mental suffering, shame, humiliation and ridicule they suffered.

Where the right of privacy is invaded, the persons injured thereby are entitled to recover substantial damages, although the only damage suffered by them resulted from mental anguish.

Substantial damages are damages of real worth and importance, of considerable value, as opposed to [221] nominal damages which are assessed to satisfy a bare legal right.

You are instructed that the law holds the defendants responsible for all injury resulting, in whole or in part, from defendants' acts, even if you should find that the defendants could not reasonably foresee or anticipate the full extent, nature, or consequence of such injury.

You are not to permit bias or prejudice to enter into the consideration, nor sympathy for the plaintiffs.

Damages must be reasonable. In the event your verdict is for the plaintiffs, you may award only such damages as will fairly and reasonably compensate them for the

injury or damage you find from a preponderance of the evidence in the case they sustained as a result of the defendants' acts.

You are not permitted to award speculative damages. This means you are not to include in any verdict compensation for prospective loss which, although possible, is wholly remote or left to conjecture and/or guess.

If, under the Court's instructions, you should find the plaintiffs are entitled to a verdict, in fixing the amount of your verdict, you may not [222] include in an otherwise just award any sum for the purpose of punishing the defendants or to set an example, nor does the law permit you to include in your award any sum for the payment of court costs or attorneys' fees.

Members of the jury, the fact that I have instructed you as to the proper measure of damages should not be construed as indicating any view of the Court as to which party is entitled to prevail in this case. Instructions as to the measure of damages are given for your guidance in the event you find from the evidence in favor of the plaintiffs.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view of reaching agreement if you can do so without violence to your individual judgments.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not [223] hesitate to reexamine your views and change your opinion if convinced it was erroneous. You are not partisans. You

are the sole judges of the facts. Your sole interest is to ascertain the truth from the evidence.

Upon returning to the jury room, you will select one of your members to act as a foreman or forelady. The foreman or forelady will preside over your deliberations and act as your spokesman.

As I have indicated, in returning a verdict the law requires that all six of your number shall agree upon any verdict. It is not necessary that all six sign the verdict, but it is necessary that all six jurors concur or agree in the verdict which may be signed by the foreman.

You will have with you in the jury room such exhibits as have been marked for identification and received as evidence in this case.

You will have with you, as well, forms of verdict for your use. You will have forms in the event you find for the plaintiffs on which you will place the amount which represents your considered judgment that the plaintiffs shall receive from the defendants; the other form to be used by you in the event you find for the defendants.

[224] If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. Never attempt to communicate with the Court other than by writing signed by your foreman.

You may now take this case and give it your fair consideration and return a verdict that conforms in your honest judgment to the facts as you find them from the evidence and in accordance with the instructions I have given you. Be fair and just to the plaintiffs and equally fair and just to the defendants.

Mr. Warder: Your Honor—

The Court: Yes?

Mr. Warder: Before the case is submitted, may I approach the bench?

The Court: Yes, you may, just as soon as I finish.

Mr. Warder: Thank you.

The Court: I further instruct you that until the jury returns its verdict, you shall not discuss the case with anyone or indicate to anyone how you might have decided any of the issues.

Now, gentlemen, if you would like to approach **[225]** the bench.

(The following proceedings were had out of the hearing of the jury.)

Mr. Warder: For the record, I wanted to renew my motions before the case is submitted.

Then I wanted to inquire—I presume you overrule?

The Court: Yes.

Mr. Warder: I want to inquire about the verdict forms.

The Court: Your exception has been noted previously and the rulings thereon will stand for both counsel.

Mr. Warder: You are talking about the charge?

The Court: Yes. The verdict forms, would you show the verdict forms?

Mr. Warder: Each verdict form they have to find—

The Court: Are you desirous of having separate—

Mr. Warder: I can see where they might have a verdict against one and not the other.

[226] The Court: I do not concede that, because on the theory of the case and the evidence as it is presented and from the theory of the charge, the invasion of privacy occurred with the publication of the articles.

Mr. Warder: This is true, but the reckless disregard or the knowledge of the three defendants can't be different.

The Court: I don't exactly follow what you are saying.

Mr. Warder: It's entirely possible that Eszterhas knew it was a falsehood where the other two defendants did not.

The Court: You are right. That is why we included in there the charge on the agency question.

Mr. Warder: Yes. But under those circumstances, absent reckless disregard or knowledge on the part of the individual defendant, that defendant is entitled to a verdict, and you make it impossible for the jury to render a verdict except against all three defendants.

The Court: Well, is it your desire that we have separate verdict forms for the defendants? I don't quite follow.

[227] Mr. Warder: Yes, I would like that.

The Court: Very well. We will submit the jury forms.

Are there any further suggestions?

Mr. Warder: No.

The Court: On the part of the plaintiff?

Mr. Sherman: No, your Honor, in view of the rulings already made, your Honor.

The Court: Very well.

(The foregoing proceedings were had out of the hearing of the jury.)

The Court: At the outset of the case a seventh juror was selected to serve as an alternate in the event any regular member of the jury was unable to appear. Such contingency has not arisen and it will not be necessary for the alternate to serve further. The Court expresses its appreciation to Mr. Jansicker and the Court suggests that you refrain from discussing the case with anyone or stating any opinion which you may have had concerning the evidence or the manner in which you would have voted until such time as the jury has returned a verdict in this [228] case.

Again, on behalf of the Court, on behalf of counsel and on behalf of the parties to this action, we express our deep appreciation to you for the attentiveness you have shown throughout the presentation of evidence, and I am confident that had you been required to serve, you would have made an excellent juror. With that, you are excused, sir. You are free to return to the jury room and you will be instructed as to what you should do.

Members of the jury, at this time the matter is submitted to you for your consideration and you may retire to the jury room with the exhibits that had been admitted.

The Court will be required to make some minor modifications in the verdict forms, and they will be supplied to you immediately upon the correction of the forms to comply with the charge.

(Thereupon, the jurors retire to the jury room.)

(The following proceedings were had in the absence of the jury.)

The Court: Have counsel gone over [229] the exhibits to be sure we only have the exhibits in there that have been introduced?

Mr. Sherman: Yes, your Honor, I have. Everything is in order, your Honor.

The Court: Mr. Warder?

Mr. Warder: I was just looking to see. I thought I left my file copies of the article over here and it had some notes on it. I didn't want that to get in there.

Mr. Sherman: Is this it?

Mr. Warder: That's it. I just wanted to be sure this was not in there.

The Court: Both counsel have examined the exhibits?

Mr. Sherman: Yes, your Honor.

The Court: And both counsel are in accord that we only have the exhibits that have been admitted?

Mr. Warder: Yes, your Honor.

The Court: Very well. I take it that neither counsel has any exceptions to conforming the verdict forms and submitting them to the jury immediately after we have the additional ones typed?

Mr. Sherman: No, your Honor.

[230] Mr. Warder: No.

The Court: The Court is going to dismiss the jury at 4:00 o'clock. Is it the desire of counsel to be present for the admonitions?

Mr. Sherman: No.

The Court: Or is the Court free to release the jury for the night after the proper admonition in the absence of counsel?

Mr. Sherman: It is certainly all right with plaintiffs' counsel.

Mr. Warder: All right with me, your Honor.

Mr. Sherman: If they don't return a verdict before then.

The Court: Does the consent of counsel apply equally to any other recesses?

Mr. Sherman: Oh, yes.

Mr. Warder: Quite so, your Honor.

The Court: Of course, counsel will be notified in the event there is a verdict or if there is a question.

Mr. Sherman: Thank you, your Honor.

The Court: Thank you, gentlemen.

I would like to see counsel.

[231] (Conference at the bench.)

The Court: Mr. Warder, the Court has considered your request for additional jury forms, and the Court will overrule that motion and present the forms in their present form.

Mr. Warder: And so far as necessary, exceptions.

(The foregoing proceedings were had in the absence of the jury.)

(The jurors resume their places in the jury box at 4:05 P.M.)

The Court: Ladies and gentlemen of the jury, in view of the hour, perhaps it would be advisable if we adjourned for the day. And, of course, during the adjournment you will recall the Court's admonition and that is not to discuss the case either among yourselves or with anyone else unless you are in the jury room discussing it among yourselves.

With that, you are free to go. What is your pleasure, 9:30 or 9:15 tomorrow? Let's make it 9:30, O.K.?

(Court was adjourned.)

[232] Thursday, September 14, 1972, 10:00 A.M.

(The following proceedings were had in chambers.)

The Court: For the record now.

Gentlemen, I have reviewed Mr. Warder's request, and in lieu of the general verdict forms, the Court will present the jury with a special verdict form, which both counsel are examining, requiring the jury to answer the four special interrogatories, which special verdict form will eliminate the objection of Mr. Warder and more specifically delineate the jury's findings.

Mr. Warder: May I suggest, your Honor, that this is proper only if they have not already reached a verdict?

The Court: They haven't. They haven't deliberated.

Mr. Warder: Oh, you have stopped them.

The Court: Right.

Mr. Warder: I see.

The Court: I have not permitted the jury to deliberate this morning and they have not arrived at any verdict; as a matter of fact, probably have not selected a foreman to this point. [233] I take it you have no objection to the form?

Mr. Warder: None.

The Court: Mr. Klein?

Mr. Klein: I don't really know whether to object or not to object. Maybe I ought to, just for the record, since Mr. Sherman isn't here.

The Court: All right. You may object.

(The foregoing proceedings were had in chambers.)

(Thereupon, the jurors resume their places in the jury box.)

The Court: Members of the jury, good morning.

Before you commence your deliberations this morning, the Court is withdrawing at this time the general verdict forms which it has supplied you originally in this matter and the Court will supply you with a special verdict form which will require you to answer four questions and the special verdict form will constitute your verdict in this case.

That verdict form reads as follows:

[234] "Special Verdict. Ladies and gentlemen of the jury, bearing in mind the instructions of the Court, you will return in this action answers to the following special issues, or such of them as may be necessary according to the specific explanations in connection with each issue.

"Special Issue No. 1. Do you find from the preponderance of the evidence that defendants Joseph Eszterhas, Richard T. Conway and Forest City Publishing Company, or any combination of said defendants, invaded the privacy of the plaintiff, or either of them, within the definition and instructions of the Court?"

And there is provided a place for your answer, either yes or no.

"If you have answered Special Issue No. 1 yes, and only in that event, then answer the following Issue No. 2.

"Special Issue No. 2. Designate the defendants that invaded the privacy of the plaintiffs or either of them."

And there is provided a space for an answer and in the answer space there are three names, Joseph Eszterhas, Richard T. Conway, Forest City Publishing, and a space for your designation **[235]** thereafter.

"If you have answered Special Issue No. 2 in the affirmative, and only in that event, then answer Special Issue No. 3."

Special Issue No. 3 reads: "Designate the plaintiff or plaintiffs whose privacy was invaded by the acts of the defendant or defendants.

"Answer: Margaret Mae Cantrell, William David Cantrell." And there is a space to designate.

"If you have answered Special Issue No. 3 in the affirmative, and only in that event, then answer Special Issue No. 4."

And Special Issue No. 4 reads as follows: "If your answer is affirmative to either one of Special Issues No. 1 and 3, in what amount, if any, measure in dollars and cents, do you find from a preponderance of the evidence that the individual plaintiffs were damaged? State such amount, or none, in the following blank spaces according to your findings."

And then there is a place for the answer.

I again remind you that all six jurors must agree on each answer, affirmative or negative, that you give to each of the special issues.

[236] Then there is a place that says: Verdict of the jury. "We, the jury, have answered the above and foregoing special issues as herein indicated and herewith return the same into court as our verdict."

And there is a place for the signature of the foreman.

Again, any verdict in this matter or any answer to any of the interrogatories must be unanimously agreed to by all of you. And all of you need not sign the special

verdict forms; it may be signed only by the foreman with the consent and agreement of each of you.

Now, with that, you may resume your deliberations.

(Thereupon, the jurors retire to the jury room at 10:10 A.M.)

(Thereupon, the jurors resume their places in the jury box at 11:20 A.M.)

The Court: You may proceed, Mr. Kraus.

Mr. Kraus: (Law Clerk-Crier) Would each member of the jury affirm his presence in the courtroom as I call his name, please?

(Thereupon, the roll was called of the jurors [237] and all six were present.)

Mr. Kraus: Members of the jury, have you agreed upon a verdict?

The Foreman: Yes, we have.

Mr. Kraus: "Special Issue No. 1: Do you find from a preponderance of the evidence that the defendants, Joseph Eszterhas, Richard T. Conway and Forest City Publishing Company, or any combination of said defendants, invaded the privacy of the plaintiffs, or either of them, within the definition or instruction of the Court?

"Answer: Yes.

"If you have answered Special Issue No. 1 yes, and only in that event, then answer the following Special Issue No. 2.

"Special Issue No. 2: Designate the defendants that invaded the privacy of the defendants or either of them.

"Answer: Joseph Eszterhas—yes. Richard T. Conway—yes. Forest City Publishing Company—yes.

"If you have answered Special Issue No. 2 in the affirmative, and only in that event, then answer Special Issue No. 3.

"Special Issue No. 3: Designate the plaintiff [238] or plaintiffs whose privacy was invaded by the acts of the defendant or defendants.

"Answer: Margaret Mae Cantrell—yes. William David Cantrell—yes.

"If you have answered Special Issue No. 3 in the affirmative, and only in that event, then answer Special Issue No. 4.

"Special Issue No. 4: If your answer is affirmative to either one of Special Issues No. 1 and 3, in what amount, if any, measured in dollars and cents, do you find from a preponderance of the evidence that the individual plaintiffs were damaged? State such amount, or none, in the following blank spaces according to your findings.

"Answer: Margaret Mae Cantrell, $45,000, William David Cantrell, $15,000.

"The six jurors must agree on each answer, affirmative or negative, that you give to each of the above special issues.

"Verdict of the jury: We, the jury, have answered the above and foregoing special issues as herein indicated and herewith return the same into court as our verdict. Foreman of the jury, Alfred Lesti."

Members of the jury, is this your verdict?

[239] (The jurors indicate it is their verdict.)

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JUDGMENT

(Filed September 14, 1972)

This action came on for trial before the Court and a jury, Honorable Robert B. Krupansky, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that plaintiff Margaret Mae Cantrell, individually, recover from the defendants the sum of Forty-five Thousand ($45,000.00) Dollars.

IT IS FURTHER ORDERED that plaintiff William David Cantrell, by Margaret Mae Cantrell, mother and natural guardian, recover from the defendants the sum of Fifteen Thousand ($15,000.00) Dollars.

IT IS FURTHER ORDERED that plaintiffs' costs be paid by defendants.

/s/ Robert B. Krupansky
United States District Judge

MOTION FOR JUDGMENT, N.O.V., AND ALTERNATIVE MOTION FOR A NEW TRIAL

(Filed September 18, 1972)

Come now defendants and each of them and separately move the court to set aside and hold for naught the verdict of the jury herein and enter judgment in favor of each of these defendants notwithstanding the verdict. This motion is made pursuant to the provisions of Rule 50(c)(1).

Reasons in support of this motion are set forth in the brief attached hereto.

Respectfully submitted,

/s/ Smith Warder,
Attorney for Defendants.

ALTERNATIVE MOTION FOR A NEW TRIAL

In the event that the foregoing motion be overruled, these defendants and each of them separately move that each of them be granted a new trial herein, pursuant to the provisions of Rule 59.

Reasons in support of this motion are set forth in the Brief attached hereto.

Respectfully submitted,

/s/ Smith Warder,
Attorney for Defendants.

ORDER GRANTING MOTION OF DEFENDANTS FOR DIRECTED VERDICT AS TO CERTAIN PLAINTIFFS

(Filed October 12, 1972)

Upon consideration,

IT IS ORDERED that the motion of defendants for directed verdict as to plaintiffs Lolita Sue Cantrell, Dora Dean Cantrell, Juanita Lee Cantrell, Terry Franklin Cantrell, Nancy Lynn Cantrell, and Keith Elmer Cantrell, minors by Margaret Mae Cantrell, mother and natural guardian, is hereby granted.

IT IS, THEREFORE, ORDERED that the complaint is dismissed as to the above named plaintiffs.

/s/ Robert B. Krupansky
United States District Judge

ORDER DENYING PLAINTIFFS' MOTION FOR NEW TRIAL AS TO MINORS AND AS TO PUNITIVE DAMAGES AND DENYING DEFENDANTS' MOTION FOR JUDGMENT N.O.V. AND ALTERNATIVE MOTION FOR A NEW TRIAL

(Filed October 13, 1972)

Upon consideration,

IT IS ORDERED that the motion of plaintiff to set aside directed verdict and motion for a new trial as to minors and as to punitive damages are hereby denied.

IT IS FURTHER ORDERED that the motion of defendant for judgment, N.O.V., and alternative motion for a new trial is hereby denied.

/s/ Robert B. Krupansky
United States District Judge

NOTICE OF APPEAL

(Filed November 10, 1972)

Come now defendants Forest City Publishing Co., Joseph Eszterhas and Richard T. Conway, through their attorneys, and give notice that they and each of them hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment entered against each of them in this action on September 14, 1972, in favor of plaintiff Margaret Mae Cantrell in the amount of Forty-five Thousand Dollars ($45,000.00), and in favor of plaintiff William David Cantrell in the amount of Fifteen Thousand Dollars ($15,000.00), and also from the order of the court entered October 13, 1972, overruling the motions made by these defendants for judgment notwithstanding the verdict and alternatively for a new trial

Respectfully submitted,

/s/ Smith Warder
Attorney for Defendants,
Forest City Publishing Company,
Joseph Eszterhas, and
Richard T. Conway

No. 73-1081

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARGARET MAE CANTRELL, ET AL.,
Plaintiffs-Appellees,

v.

FOREST CITY PUBLISHING CO., a corporation, JOSEPH ESZTERHAS, AND RICHARD T. CONWAY,
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed September 10, 1973.

Before: EDWARDS, PECK and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. In this diversity case a jury awarded damages to two private citizens in their action for invasion of privacy against the publisher of The Cleveland Plain Dealer, a reporter and a photographer. At the conclusion of the plaintiffs' case, in response to a motion for a directed verdict on behalf of all the defendants, the District Court found "that there has been no evidence to support the charges that the invasion of privacy, if in fact an invasion of privacy occurred was done maliciously within the legal definition of that term." The Court then ordered stricken all allegations relating to punitive damages, and dismissed as to several infant plaintiffs, but denied the motion for a directed verdict as to the two plaintiffs who are appellees. The issue is whether, having ruled that there was no evidence

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that the defendants had acted maliciously "within the legal definition of that term," the District Court should have granted a directed verdict. The defendants renewed their motion at the conclusion of all the evidence and made a timely motion for judgment notwithstanding the verdict or a new trial. All these motions were likewise denied. We reverse.

On December 15, 1967 a bridge across the Ohio River at Point Pleasant, West Virginia collapsed. Among the forty-four persons who lost their lives in this tragic accident was Melvin Aaron Cantrell, the 40-year old father of seven children. The "Silver Bridge disaster," as it was labeled by the press, was page one news throughout the country. The Cleveland Plain Dealer sent the defendant Joseph Eszterhas, a feature writer, to the scene and one of his dispatches which was published a few days later described the funeral of Melvin Cantrell. This story was written in the style of a news feature rather than a purely factual account. It dwelt upon the tragic consequences, rather than the details of the accident itself. The article focused on the condition of the Cantrell family as illustrating these consequences.

In early May 1968 Eszterhas and a Plain Dealer photographer, the defendant Richard T. Conway, returned to the Point Pleasant area to do a follow-up feature. Both newspapermen were off duty and operating free-lance. However, before they left Cleveland one of the editors of the Plain Dealer told them that if they came up with a good story the paper would buy it. After stopping for directions, Eszterhas and Conway went to the home owned by Margaret Cantrell, widow of Melvin, and occupied by her and six children ranging in age from 1 to 16 years. Mrs. Cantrell was not at home and a daughter, Dora, was the oldest child there. During a stay of one to one and one-half hours Conway took 50 pictures and Eszterhas talked with the children. There was little evidence as to whether the reporter and photographer were invited into the house. Dora did not testify, but William David Cantrell who was 13 at the time of the event and 17 at trial time, testified

that he saw the men coming across the field and that the door to the house was open. He said no one asked them in and no one asked them to get out. He also said the door was open because the men were coming. William said he assumed the men were from a newspaper, but didn't ask which one. Neither he nor the other children made any objection to being photographed.

The Sunday Magazine of The Cleveland Plain Dealer for August 4, 1968 carried as its lead feature a story entitled, "Legacy of the Silver Bridge." The story by Eszterhas contained a number of inaccuracies and inferred that Mrs. Cantrell was present in her home when he returned to Point Pleasant in May. Five of Conway's pictures were printed with the story. In these pictures the Cantrell home appeared to be dirty and run down and the children were poorly clothed and untidy. The hopeless poverty of the family was emphasized in the feature. The reporter again used the condition of the Cantrell family to illustrate the consequences of the bridge disaster. In the more dramatic language of the article, "His death is a microcosm of the scar which will remain permanent and stark upon the spirit of the people here."

The assistant Sunday editor and assistant managing editor of the Plain Dealer testified that Eszterhas had a good reputation for accuracy of reporting at the time the 1968 article was published. In fact, he won three press awards for his coverage of the Silver Bridge collapse. Conway testified that the photographs fairly depicted the persons and scenes as he found them at the Cantrell residence. He did not suggest that the children make themselves or the home more tidy before the pictures were taken. Joseph Eszterhas did not testify. There was no evidence that Forest City Publishing Company had knowledge of any of the inaccuracies contained in the article.

The complaint alleged that the privacy of the plaintiffs had been violated by the intrusion of the newsman and photographer, for unreasonable publicity about their private lives

and for falsely presenting their condition and making them objects of pity and ridicule. Mrs. Cantrell brought suit for herself and all of her children, but all plaintiffs except Mrs. Cantrell and one son, William David Cantrell, were dismissed by the Court. The complaint also charged the defendants with "malicious and defamatory libel." As developed by the evidence the intrusion complained of consisted of publication of an article which placed the Cantrell family in a bad light because of its inaccuracies and untruths. This is the way the matter was presented to the jury and there is no complaint on appeal concerning the jury charge. On appeal the appellees attempt to treat the entry of the two defendants into their home without an invitation when only children were present as the intrusion for which damages were justified. However, this was not the theory on which the case was tried in the District Court.

Our search for the controlling principles in effect today begins with *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), a civil libel action. In that case the Supreme Court enunciated a federal rule, required by the Constitution, which denies recovery to a public official for defamatory falsehood concerning his official acts unless he proves actual malice, that is, that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279-280. The Court reasoned that to permit virtually unlimited libel judgment against critics of official conduct for failure to determine the truth of every assertion made would lead to a self-censorship by news media that would be as stifling to the widespread dissemination of information as official censorship. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), the same requirement for recovery was applied to a prosecution for criminal libel based on statements made about public officials. Furthermore, the rule of *New York Times* was extended to cover false statements about anything which might relate to an official's fitness for office, not just his official conduct.

In *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), it was held that the term "public officials," for purposes of the *New York Times* rule, includes all government employees having, or appearing to have "substantial responsibility for or control over the conduct of governmental affairs." *Id.*, at 85. It had been contended that the rule applied only to libel actions by elected officials. The same requirement for recovery has been applied to civil libel actions by candidates for public office, *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971), and to cases where the plaintiff is a "public figure" rather than a public official. *Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, 398 U.S. 6 (1970). In *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), recovery in a civil libel action for a defamatory falsehood contained in a broadcast was denied to a private citizen who was neither a "public official" nor a "public figure" where actual malice as defined in *New York Times* was not proven. The plurality opinion of three members of the Court extended the requirement of a showing of actual malice for recovery to matters of "public or general interest." 403 U.S. at 43. In addition, this opinion required a standard of "clear and convincing proof" that the defamatory falsehood was published with knowledge that it was false or with reckless disregard for its truth or falsity which must be met to sustain a libel action against one within the protection of the First Amendment.

In the course of developing the scope of privilege conferred upon the news media with regard to actions seeking damages for libel and defamation, the Supreme Court was called upon to apply the *New York Times* principles to a case of invasion of privacy. In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), recovery of damages under a New York right of privacy statute was not permitted in the absence of a showing that a false report of a newsworthy event was published either with knowledge of its falsity or in reckless disregard of its truth or falsity.

The case involved an article which appeared in Life magazine in February 1955 and was a highly fictionalized account of an ordeal experienced by the Hill family more than two years earlier when they were held hostage in their home for 19 hours by three escaped convicts. The Hills had moved to a different state and had discouraged all efforts by the media to keep them in the spotlight. The occasion for the article in Life was the opening in New York of a play, based on a novel which had appeared in 1953. Reports of a number of hostage incidents were used as source material by the novelist, and the Hill family was not identified in the novel or the play. The pictures which accompanied the Life article were taken at the former Hill residence where the incident had occurred, with actors portraying events which were quite different from the actual experiences of the Hills. These pictures indicated that the convicts had mistreated the family, whereas Mr. Hill had stated to newsmen immediately after the release of the family that there had been no violence, that no one was molested by their captors and that the family had been treated courteously.

One important difference between *Hill* and the present case is that the opening of the New York play was considered a matter of sufficient public interest to justify bringing the actual incident back into the news. 385 U.S. at 388. There is no evidence of any activity related to the "Silver Bridge disaster" which would have naturally rekindled public interest in the event. Nevertheless, the article complained of appeared less than nine months after the event and we believe the "journalistic judgment" of a newspaper publisher (Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, — U.S. — (41 U.S. Law Week 4688, May 29, 1973)) cannot be circumscribed by linking newsworthiness solely to the passage of time.

In their briefs the appellees seek to differentiate *Time, Inc.* v. *Hill*, *supra*, on the further ground that there was no physical intrusion by representative of Life, whereas Eszterhas

and Conway did intrude into the Cantrell home. The two newsmen may have been guilty of a trespass against the property of the Cantrells. However, the gravamen of this action lies in the claim that the publication of the article, not the physical intrusion, damaged the plaintiffs. Appellees cite *Dietemann* v. *Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), for the proposition that the physical intrusion into their home is sufficient invasion of privacy to sustain the judgment. In *Dietemann* two reporters gained entrance to the home of the plaintiff by subterfuge, and took pictures with a hidden camera and recorded conversations by means of a hidden microphone. The Court held that the later publication of some of the pictures and printed matter based on the recordings did not immunize the publisher from responding in damages for the intrusion. The Court found that the invasion of privacy consisted of the clandestine photography and recording and that "publication is not an essential element of plaintiff's cause of action." 449 F.2d at 249. In her testimony Mrs. Cantrell claimed no injury from the entry of the two defendants on her premises, but testified that the article made her mad and upset her because of all the untruths it contained. On cross-examination she said that she objected to the Plain Dealer article for what it said, not because of the publicity. Here publication was clearly an essential element of the cause of action.

In *Varnish* v. *Best Medium Publishing Co.*, 405 F.2d 608 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969), relied upon by plaintiffs, the Court specifically found that the evidence of invasion of privacy was sufficient to establish that an article containing falsehoods was published with knowledge of its falsity or in reckless disregard for truth. In the present case the District Judge made a finding that there was no evidence to support the claim that an invasion of privacy was done maliciously "within the legal definition of that term." A finding of actual malice as defined in *New York Times*, is not required only for punitive damages, but is necessary also to

support an award of compensatory damages. Having correctly determined that there was no evidence of known falsity or reckless disregard of the truth, the District Court should have granted the motion for a directed verdict as to all defendants.

There is an unavoidable conflict between the desire of most individuals for anonymity and privacy and the right of the people to enjoy a free flow of information guaranteed by the freedom of press provision of the First Amendment. There is no explicit guarantee of the right of privacy in the Constitution, nor was an action for its violation known at common law. The advent of this action has been traced by most commentators to an article, *The Right of Privacy*, by Warren and Brandeis which appeared in the Harvard Law Review in 1890 (41 Harv. L. Rev. 193). Though this article provides the rationale for recognition of the right, developments over the years have led to fundamental departures from the ideas expressed in it.

A legally protected right of privacy has been declared to exist in most American jurisdictions, including Ohio and West Virginia. See Prosser, *Privacy*, 48 Calif. L. Rev. 383. The Restatement of Torts also recognizes the concept:

> The right of privacy is invaded when there is:
>
> a) An unreasonable intrusion of one's seclusion, or
> b) An appropriation of the other's name or likeness, or
> c) Unreasonable publicity given to one's private life, or
> d) "Publicity which unreasonably places the other in a false light before the public . . . ."
>
> Restatement 2d, Torts, § 652A.

Dean Prosser has written that the Restatement actually describes the invasion of four different interests and that four separate torts are included in the right of privacy, having in common an interference with the right "to be let alone." Prosser, *op cit.* at 389.

In dealing with privacy cases it is important that a court recognize and treat differently the various wrongs which are

included in the general concept of invasion of privacy. With reference to the classifications of the right of privacy set forth in the Restatement and Prosser, the action of the Cantrells was tried as one for publicity which unreasonably places a person in a false light before the public. *Time, Inc.* v. *Hill, supra*, was concerned with a New York statute which forbade the appropriation of a person's name or a likeness for profit. On appeal, it was presented as a "false light" case, since it was agreed that the right of the plaintiffs to recover depended on proof that the account of their experience was fictionalized. Since falsity was an element of the wrong, the Court applied the rule from *New York Times* v. *Sullivan, supra*. Since the present case was tried under the same theory as to the type of invasion of privacy complained of, we have sought to apply the rule of *Time, Inc.* v. *Hill, supra*.

While the Constitution does not explicitly guarantee the right of privacy, the Supreme Court has held that such a right does exist and is protected by various provisions of the Bill of Rights. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). When an invasion of privacy involves publication, the First Amendment must be considered and a mere balancing of rights will not suffice. If there are preferred positions among the rights guaranteed by the Bill of Rights, certainly such priority attaches to freedom of speech and the press rather than to the less explicit and less well defined right of privacy. See Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 Columbia L. Rev. 693. When the particular invasion of privacy complained of consists of publicity which places the plaintiff in a false light in the public eye, and the publication meets a reasonable standard of newsworthiness, then an action may be sustained only if actual malice as defined in *New York Times* v. *Sullivan, supra*, is established.

Our holding does not mean that a private citizen who involuntarily becomes newsworthy in the judgment of a publisher will forever remain a fair subject of publicity. In two cases decided forty years apart, *Melvin* v. *Reid*, 112 Cal. App.

285, 297 P. 91 (1931), and *Briscoe* v. *Reader's Digest Association*, 483 P. 2d 34 (Calif. 1971), the Supreme Court of California dealt with situations where publications which were essentially truthful were held to constitute an invasion of privacy because the passage of time had rendered the subjects of the articles no longer newsworthy. In each case criminal activities which had occurred many years earlier were publicized and the person revealed to have committed them was at the time of the publication an accepted member of society who had made a clean break with the past. In *Briscoe* the California Court held that a person who was formerly in the news, after a period of time, was entitled to the "expectation of anonymity regained." 483 P.2d at 41. These cases correctly establish a rule that there is no absolute immunity from damages for publishing truthful matters about essentially private persons long after their connection with newsworthy events has ceased to exist. This is particularly true when the matter made public is offensive according to the standards of reasonable men.

On the other hand, despite vigorous efforts to avoid publicity, some people remain newsworthy because of circumstances which arouse a legitimate interest in their lives. In *Sidis* v. *F-R Publishing Corporation*, 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1941), this was held to be true in the case of a child prodigy who had made every effort for 25 years to avoid publicity and for whom the results of later publicity were disastrous. The judgment of what is newsworthy must remain primarily a function of the publisher. However, in cases where essentially private persons are the subject of publicity because of their involuntary connection with events of widespread interest, this discretion or judgment of the publisher cannot be absolute. The curiosity and voracious appetite of the public for scandal would be too easily exploited by unscrupulous publishers. The right of the public to know is clearly one of the primary values protected by the First Amendment and its ". . . guarantees are not for the

benefit of the press so much as for the benefit of all of us." *Time, Inc.* v. *Hill*, *supra* at 389. No test has been authoritatively formulated (see Bloustein, *Privacy, Tort Law and the Constitution*, 46 Texas L. Rev. 611, 626 for a thoughtful suggestion) for judicial review of "newsworthiness" in these cases. Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher. This is not such a case.

In *Rosenbloom* v. *Metromedia*, Justice Brennan writing for the Supreme Court stated the problem and the American answer to it as follows:

> We are aware that the press has, on occasion, grossly abused the freedom it is given by the Constitution. All must deplore such excesses. In an ideal world, the responsibility of the press would match the freedom and public trust given it. But from the earliest days of our history, this free society, dependent as it is for its survival upon a vigorous free press, has tolerated some abuse. In 1799, James Madison made the point in quoting (and adopting) John Marshall's answer to Talleyrand's complaints about American newspapers, American State Papers, 2 Foreign Relations 196 (U.S. Cong. 1832):
>
> > " 'Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness*, is seen and lamented, ***but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from***

> ***the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.'"*** 6 Writings of James Madison, 1790-1802, p. 336 (G. Hunt ed. 1906) (emphasis in original). 403 U.S. at 51.

Although Mrs. Cantrell and her son were displeased with the article published by the Plain Dealer and the article was not as carefully written as it should have been, nevertheless there was no proof that the Forest City Publishing Company printed and distributed the article with any knowledge of the falsities contained in it or in reckless disregard of whether or not it was true. Absent a calculated falsehood, the publication or broadcast of material concerning an event of public interest may not result in the imposition of a judgment for damages because of falsehoods or distortions arising from negligence or poor reporting. The failure of the defendant Forest City Publishing Company to verify the factual assertions in the story is not condoned, but there was no evidence of calculated falsehood. See *St. Amant* v. *Thompson*, 390 U.S. 728, 733 (1968).

The judgment of the District Court is reversed and the case remanded for entry of judgment for the defendants.

[Filed, September 10, 1973, James A. Higgins, Clerk]

United States Court of Appeals for the Sixth Circuit

No. 73-1081

MARGARET MAE CANTRELL, ET AL., PLAINTIFFS-APPELLEES

v.

FOREST CITY PUBLISHING CO., A CORPORATION, JOSEPH ESZTERHAS AND RICHARD T. CONWAY, DEFENDANTS-APPELLANTS

Before EDWARDS, PECK and LIVELY, Circuit Judges

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for entry of judgment for the defendants.

It is further ordered that Defendants-Appellants recover from Plaintiffs-Appellees, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the court

JAMES A. HIGGINS,
Clerk.

A true copy.
Attest:
Issued as mandate: Costs: Filing fee, $———, printing, $———, total, $———.

JOHN P. HEHMAN, *Clerk.*

Supreme Court of the United States
October Term, 1973

No. 73–5520

MARGARET MAE CANTRELL ET AL., PETITIONERS

v.

FOREST CITY PUBLISHING CO. ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted.

JULY 8, 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

Case No. 73-5520

MARGARET MAE CANTRELL, *et al.*,

Petitioners,

v.

FOREST CITY PUBLISHING CO., a corporation, JOSEPH ESZTERHAS, and RICHARD T. CONWAY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

Case No. 73-5520

Margaret Mae Cantrell, *et al.*,

Petitioners,

v.

Forest City Publishing Co., a corporation, Joseph Eszterhas, and Richard T. Conway,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

A. United States District Court for the Northern District of Ohio.

No opinion was filed by the District Court. The record clearly shows that the Trial Court found as a matter of law that there was no evidence of malice "within the legal definition of that term." However, notwithstanding such express finding, defendants' motion to dismiss the case, as to Petitioners, was denied by the Trial Court and the case was submitted to the jury. Judgment was thereafter entered on the jury verdicts for $45,000.00 and $15,000.00 in favor of the Petitioners. Defendants' timely motion for a new trial and for judgment notwithstanding the verdict was denied by the Trial Court.

B. *United States Court of Appeals for the Sixth Circuit.*

In an unanimous opinion, filed September 10, 1973, the Court specifically ruled that "Having correctly determined that there was no evidence of known falsity or reckless disregard of the truth, the District Court should have granted the motion for a directed verdict as to all defendants" (Opinion, p. 8). Accordingly, the Court of Appeals reversed the judgments and remanded the case to the District Court for entry of judgment for the defendants.

Question Presented

Should certiorari be granted in an action for invasion of privacy based upon the publication of an article concerning a matter of public interest where the lower Courts correctly applied the constitutional standards in accordance with the controlling cases of this Court and where the lower Courts found no evidence of known falsity or reckless disregard of the truth?

Statement of the Case

On December 14, 1967, the Silver Bridge connecting Ohio with West Virginia collapsed into the Ohio River. This tragedy resulted in the loss of 44 lives and was the subject of widespread public interest and concern (Pltf. Ex. 1). Among those killed were Mel Cantrell and Cecil Counts, passengers in a car driven by Margaret Cantrell (A. 15).[1] The following day, The Plain Dealer sent reporter Eszterhas to cover the story. During the course of this assignment, Eszterhas met Margaret Cantrell—one of the 18 survivors of the tragedy—and attended the funeral of her deceased husband, Mel Cantrell (Deft. Ex. 2). Eszterhas interviewed the survivors of the bridge tragedy

[1] Reference to Pages in the Appendix.

and members of the family of those who were killed (Pltf. Ex. 1). As a result of this on-the-scene investigation, Eszterhas wrote an article published in The Plain Dealer for which he was awarded an annual prize presented by the Press Club of Cleveland (A. 67-68). He also shared in an award given by the Ohio Associated Press Society of Columbus, Ohio, for the coverage of this story (A. 69).[2]

On a weekend in May, 1968—five months later—Eszterhas returned to the scene of the tragedy at Point Pleasant, West Virginia, accompanied by a photographer, Richard Conway, to ascertain the effects of the Silver Bridge tragedy on those directly involved. They went to the Cantrell family (A. 45, 62, 75). While at the Cantrell home Eszterhas interviewed, and Conway photographed (A. 78), those members of the family who were present. The impressions of this interview and the photographs taken were published in the August 4, 1968 issue of The Plain Dealer (Pltf. Ex. 1).

ARGUMENT

This Court has firmly established as the constitutional standard to be applied in First Amendment cases, that where there is a publication concerning a matter of public interest, Petitioners must prove malice as defined.

Petitioners have not shown any special or important reason for this Court to grant certiorari. The decision below is not in conflict with the decisions of other Courts of Appeals in this area. There has been no departure from the accepted and usual course of judicial proceedings. The matter in issue is not novel to this Court and the decision below is harmonious with the applicable decisions of this Court.

[2] Eszterhas received an award in 1970 from the Ohio Associated Press Society for his exclusive story in November, 1969, on the My Lai massacre (A. 69).

This Court has firmly established that a plaintiff, in a First Amendment action, must prove by clear and convincing evidence that the article complained of, or statement made, was published with knowledge that it was false or with reckless disregard of whether it was false or not. This requirement of "clear and convincing proof" has been applied to a wide range of subjects within the public interest doctrine[3], including the instant case. This *New York Times*

[3] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1963); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964)—comment of a local District Attorney concerning local judiciary; *Henry* v. *Collins*, 380 U.S. 356 (1965)—comments by defendant that his arrest was a result of a "diabolical plot" by County Attorney and City Police Chief; *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966)—charges by union of wrongdoing by official of Pinkerton's National Detective Agency during a union-organizing campaign; *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966)—comments that a supervisor of a New Hampshire ski resort had improperly performed his duties; *Time* v. *Hill*, 385 U.S. 374 (1967)—a human interest story in connection with the opening on Broadway of a new play adapted from a book based on a crime involving plaintiffs, as victims, several years earlier; *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)—a claim that the football coach of the University of Georgia revealed certain of his team's plays to an opponent prior to their game; *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967)—charges made during an election campaign; *St. Amant* v. *Thompson*, 390 U.S. 727 (1968)—charges made by a candidate for public office; *Pickering* v. *Board of Education*, 391 U.S. 563 (1968)—improper dismissal of a teacher for writing a letter to the editor of a newspaper criticizing the Board of Education; *Greenbelt Coop. Pub. Asso.* v. *Bresler*, 398 U.S. 6 (1970)—use of the term "blackmail" in connection with the presentation of a local real estate developer at a City Council meeting; *Patriot Co.* v. *Roy*, 401 U.S. 265 (1971)—referring to a candidate for the U.S. Senate as "a former small-time bootlegger" with the Court noting no distinction between the evidence concerning the private life and public life of such candidate; *Time* v. *Pape*, 401 U.S. 279 (1971)—insufficient evidence of falsification to create a jury issue or sustain a jury finding of actual malice in a matter involving a Chicago policeman; *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971)—erroneous identification of a candidate for County Tax Assessor as one who had been charged in Federal Court with perjury in a civil rights suit; *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971)—identification of a private person as a pornographer.

doctrine has been extended to all publications involving matters of public interest in furtherance of the First Amendment right of the public to be kept informed. *Time, Inc.* v. *Hill, Rosenbloom* v. *Metromedia*, both *supra*.

The Trial Court found "that there had been no evidence to support the charge that the invasion of privacy, if in fact an invasion of privacy incurred, was done maliciously within the legal definition of that term" (A. 60). The Court of Appeals in referring to the Trial Court's finding of no malice stated that ". . . the District Court should have granted the motion for a directed verdict as to all defendants." (Opinion, p. 8.)

Petitioners fail to show any constitutional basis for granting their petition for certiorari. Petitioners have apparently misconstrued the questions presented and the theory upon which this case was tried below—invasion of privacy by publication under the First Amendment—with questions concerning physical trespass, criminal wire tap, the right to trial by jury and unreasonable search and seizure. These questions are not present in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully urged that Plaintiffs' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5520

MARGARET MAE CANTRELL, *et al.*,

Petitioner,

v.

FOREST CITY PUBLISHING CO. a corporation, JOSEPH ESZTERHAS and RICHARD T. CONWAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5520

MARGARET MAE CANTRELL, *et al.*,

Petitioner,

v.

FOREST CITY PUBLISHING CO. a corporation, JOSEPH ESZTERHAS and RICHARD T. CONWAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

REPORTS OF OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit is reported in 484 F.2d 150, and was entered September 10, 1973, reversing judgment entered on special verdicts for petitioners in the United States District Court for the

Northern District of Ohio, Cleveland, Ohio, in Civil Action No. 68-162, on September 14, 1972. Motions of respondents for judgment n.o.v. or new trial were denied in the District Court on October 13, 1972. Notice of Appeal to the Court of Appeals was filed November 10, 1972.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1). Petition for writ of certiorari, together with motion for leave to proceed in forma pauperis pursuant to 28 U.S.C.A. 1915 and Supreme Court Rule 53 were lodged September 26, 1973. The writ of certiorari was granted July 8, 1974 and leave granted concurrently to proceed in forma pauperis.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the personal right of privacy as evolved from the "penumbral" provisions and implications of the First, Fourth, Fifth and Ninth Amendments, inter alia, of the Constitution, and the laws of privacy of West Virginia and Ohio as recognized by their highest courts; and the First Amendment freedom of the press provision as violating same.

The First Amendment's "right of the people peaceably to assemble", (as applied herein to the Cantrell family in their private home) is set forth in U.S.C. Constitution, page 319, n. 14.

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers and effects, . . ."; and its application to the within case is asserted on the decisional bases set forth in U.S.C. Amendment 4, p. 361, notes 23 and 1144.

The Fifth Amendment's prohibitory clause: ". . . . .nor be deprived of life, liberty, or property without due process of law"; as set forth in U.S.C. Constitution, Amendment 5, p. 418, and herein asserted as applicable as interpreted in cases cited under note 42.

The Ninth Amendment's mandate that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", as set out in U.S.C. Constitution, Amendment 9, is made applicable to the within case by decisional interpretation set out in note 4a of the 1974 pocket part, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705.

The Seventh Amendment's protection of petitioners' right to trial by jury, and its assurance that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law", as set out in U.S.C. Constitution, Amendment 7, p. 696, is made applicable to the within case by notes 201 and 203, where, as here, the jury found that the publication was knowingly false or in reckless disregard of truth or falsity, constituting malice as defined in *New York Times v. Sullivan*, if the same were in fact here controlling.

QUESTIONS PRESENTED FOR REVIEW

I. In a diversity suit asserted on West Virginia right of privacy law as well as on Ohio's right of privacy law, where the complained of invasion consisted of the physical, uninvited and unforgiven intrusion by respondents into the private and secluded home of petitioners, neither of whom were public officials or public figures, and in the absence of the mother, Margaret Mae Cantrell, the taking of uncomplimentary photographs (50) therein, several of which were thereafter published in a lengthy, illustrated, knowingly false and fictionalized Sunday feature story, emotionally distressing and humiliating to petitioners; should a jury verdict in their favor and judgment thereon be voided for lack of specific proof of malice? (Affirmed by Court of Appeals)

II. Is the "general right to privacy" of individuals–the "right to be let alone by other people"–no longer to be "left largely to the law of the individual States" as declared by the Supreme Court in *Katz v. United States*, 389 U.S. 347, 352?

III. Is the Seventh Amendment right to trial by jury in civil cases applicable in invasion of privacy cases involving intrusions, trespasses and physical acts other than mere knowing or reckless publication of false and fictionalized defamation of private citizens, including infants, other than public officers or public figures? (Denied in effect by the Court of Appeals)

IV. Does a knowingly false publication of an uncomplimentary and humiliating feature article not published on any newsworthy occasion and incorporating several of the embarassing photographs obtained

by trespass into the private home of petitioners, without invitation, and in the absence and without the knowledge or permission of the mother of seven infant family members, ranging in age from 2 to 17 years, wipe out petitioners' Constitutional and West Virginia "protected" right of privacy unless they otherwise proved malice in such publication? (Affirmed by the Court of Appeals)

STATEMENT OF THE CASE

On December 14, 1967, the Silver Bridge spanning the Ohio River between Point Pleasant, West Virginia, and Kanauga, Ohio collapsed, precipitating motor vehicles thereon and their occupants in twisting steel and crunching automobiles to the waters and banks below, with macabre loss of 44 lives and numerous injuries to survivors. One of the fatalities was Melvin Aaron Cantrell. His widow, Margaret Mae Cantrell, seriously injured in the wreckage of their automobile on the Ohio shore, survived. Another occupant of the ill-fated car was also killed. None of the seven children of the Cantrells, then ranging in age from 16 years to one year, were involved in the disaster.

Shortly prior to the August 4, 1968 knowingly false publication involved herein, respondents Joseph Eszterhas, then a reported, and Richard T. Conway, a photographer, both employed by the corporate respondent, Forest City Publishing Co., without invitation or knowledge of Mrs. Cantrell or of any other member of the family, came upon the land and entered the home of the Cantrell family, and in the absence of Mrs.

Cantrell, admittedly took 50 photographs of the children and of the premises; and Eszterhas (who did not testify on trial or by deposition) assertedly "interviewed" the older of the children. On August 4, 1968, the Sunday supplement of the corporate respondent's Cleveland Plain Dealer carried the knowingly false feature article of several pages spread, entitled "Legacy of the Silver Bridge", fictionalizing conversations with Mrs. Cantrell, falsely misrepresenting the facts of the disaster as related to Mrs. Cantrell and her husband, and cruelly reflecting on the little Gallipolis Ferry, West Virginia home, possessions, appearances and condition of the Cantrell family and children. The theme of the publication was to make of the "statistic" of Melvin Aaron Cantrell, and his demise a featured "microcosm of the scar which will remain permanent and stark upon the spirit of people . . ." of Appalachia, the "hillbillies", that is, who lived there, and who "had little to live for and had little they owned . . ." who "had wives and children, and that's all they had".

Several of the 50 photographs taken were reproduced in the article, all of those published depicting the children and the Cantrell home as being most pathetic, dirty, uncared for, and neglected.

There was no news event or occasion for the uninvited intrusion into the private home and lives of the Cantrell family; and the sole intent of the respondents was to create a feature article for the interest of their reading public. (A vol. I, p. 62, 75)

The knowlingly false and fictionalized article was so offensive to the community as to provoke editorial and frontpage criticism in a local publication, inter alia. (A.

Plaintiff's Exhibit 7, Defendants' Exhibit 1) The children were embarassed at school and in public. (A. vol. I, p. 29)

The District Judge had sustained motions to dismiss as to the six youngest children on the basis that they were too young to have suffered humiliation or emotional trauma; and rejected the claim for punitive or exemplary damages prior to submitting to the jury the following special verdicts, to which the jury returned the answers presented:

"Special Issue No. 1: Do you find from a preponderance of the evidence that the defendants, Joseph Eszterhas, Richard T. Conway and Forest City Publishing Company, or any combination of said defendants, invaded the privacy of the plaintiffs, or either of them, within the definition or instruction of the Court?

"Answer: Yes.

"If you have answered Special Issue No. 1 yes, and only in that event, then answer the following Special Issue No. 2.

"Special Issue No. 2: Designate the defendants that invaded the privacy of the plaintiffs or either of them.

"Answer: Joseph Eszterhas–yes. Richard T. Conway –yes. Forest City Publishing Company–yes.

"If you have answered Special Issue No. 2 in the affirmative, and only in that event, then answer Special Issue No. 3.

"Special Issue No. 3: Designate the plaintiff (238) or plaintiffs whose privacy was invaded by the acts of the defendant or defendants.

"Answer: Margaret Mae Cantrell–yes. William David Cantrell–yes.

"If you have answered Special Issue No. 3 in the affirmative, and only in that event, then answer Special Issue No. 4.

"Special Issue No. 4: If your answer is affirmative to either one of Special Issues No. 1 and 3, in what amount, if any, measured in dollars and cents, do you find from a preponderance of the evidence that the individual plaintiffs were damaged?

"Answer: Margaret Mae Cantrell, $45,000, William David Cantrell, $15,000.

"The six jurors must agree on each answer, affirmative or negative, that you give to each of the above special issues.

"Verdict of the jury: We, the jury, have answered the above and foregoing special issues as herein indicated and herewith return the same into court as our verdict. Foreman of the jury, Alfred Lesti."

Members of the jury, is this your verdict?

(239) (The jurors indicate it is their verdict.)"

In instructing the jury, the District Court had said (A. Vol. I, p. 103):

> "Thus if it be your conclusion and determination that plaintiffs have failed to prove by a preponderance of the evidence that defendants invaded the privacy by publishing a report or article about them with knowledge of its falsity or in reckless disregard of the truth, you need not deliberate further and you will return a verdict in favor of the defendants".

On September 14, 1972, the District Court entered judgments on the verdict, and on October 13, 1972 an order was filed denying the defendants' motion for a judgment non obstante veredicto or in the alternative for a new trial. The defendants appealed to the United States Court of Appeals for the Sixth Circuit on November 10, 1972. The Opinion and Judgment of the Court of Appeals reversing the District Court judgment and remanding for entry of judgment for the defendants was filed September 10, 1973. This petition for certiorari was forwarded to the Clerk of this Honorable Court on September 24, 1973, together with a motion for leave to proceed in forma pauperis upon the original record, and the appendices accompanying the brief and reply brief of the defendants in the Court of Appeals.

Federal jurisdiction in the District Court was asserted on the basis of divessity of citizenship and an amount in controversy in excess of Ten Thousand Dollars for each plaintiff, exclusive of interest and costs. Jurisdiction was admitted.

SUMMARY OF ARGUMENTS

A. The Questions involved are substantial and require resolution by this Honorable Court; so as to obviate further lower court confusion and conflict arising from decisions herein involving the judicially expanded First Amendment rights of publishers, in relation to the right of a private person "to be let alone", described by the late and revered Justice Louis D. Brandeis as "the right most valued by civilized men". (1928):

Under the holding of the Court of Appeals, the subsequent publication of even a knowingly false, fictionalized feature article, unconnected with any current newsworthy event, concerning private persons in their private home, after entry therein by uninvited

trespass, during which trespass the publisher's photographer took 50 uncomplimentary and embarassing photographs of the seven minor children in the absence and without knowledge or permission of their widowed mother; that nevertheless such publication, including several of the photographs, bring into play the *New York Times v. Sullivan* extension of the First Amendment's guarantee of freedom of the press so as to supercede petitioners' right of privacy under such circumstances. Such holding conflicts with decisions of the Supreme Court.

B. The case is of great importance in the "expanding law of invasion of privacy", in that the decision of the Court of Appeals in effect encourages unwanted and uninvited invasions by intrusion, deception and trick into the private homes of private persons by uninvited and unwanted photographers and reporters whose publisher can, under the holding of the Court of Appeals, assure them immunity from answerability in damages by merely publishing the purloined, twisted and fictionalized product of their intrusive invasion of such privacy.

C. The decision of the Court of Appeals enlarges the Constitutional rights of publishers beyond the holdings herein and to the point of eliminating the right of privacy of all persons even in their private residences, though they are neither public officers or figures nor involved in or part of any news event or timely matter of public interest.

D. The decision of the Court of Appeals in effect limits jurisdiction of the federal courts to make judicial inquiry or review, and holds that the judgments of the publishers must control in all cases catalogued by them alone as "newsworthy".

E. The decision of the Court of Appeals wipes out the right of victims of intrusive invasions of privacy to Seventh Amendment guarantee of trial by jury in civil actions asserted upon prevailing State laws and constitutions protecting such private rights.

F. The decision of the Court of Appeals ignores the established and accepted authorities such as Dean Prosser whose work on Torts, 3rd ed. p. 832 has been widely approved by our courts, citing the four separate torts involved in an invasion of privacy, such as are involved in the within case, namely: "(1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name and likeness"; 62 Am. Jur. 2d, Privacy, par. 1, 26. The Court of Appeals makes no distinction in cases based solely on publications and those involving uninvited physical intrusions into the private, personal homes of private persons, not incidental to any current news or matter of public interest, and resulting in unwanted and humiliating exposure by false, fictionalized and defamatory distortion of the very private home and personal circumstances of the petitioners.

G. The decision of the Court of Appeals ignores or misconstrues the holdings of *Curtis Publishing v. Butts*, 388 U.S. 130, 87 S. Ct. 1975; the "penumbral" privacy rights decisions of *West Virginia State Board of Education v. Barnette*, 319 U.S., 624, 63 S. Ct. 1178; *Stanford v. State of Texas*, 379 U.S. 476, 85 S. Ct. 506; and the "general right to privacy" holding of *Katz v. United States*, 389 U.S. 347, inter alia, as well as

negating the State laws of West Virginia and Ohio in the matter of physical intrusion of privacy cases.

H. The decision of the Court of Appeals fails to distinguish between the basic essentials of actions of defamation and those of invasion of privacy, holding that malicious untruths in either form of action must be established affirmatively by a plaintiff at trial; whereas even a truthful but improper exposure of private matters can give rise to an action for invasion of privacy; *Time, Inc. v. Hill*, 385 U.S. 374.

I. The decision of the Court of Appeals conflicts with the decisions of other Circuit Courts and with the decisions of the Supreme Courts of Ohio and West Virginia; *Young v. That Was the Week That Was*, etc., 423 F.2d 265; *Cordell v. Detective Publications*, 419 F.2d 989; *Housh v. Peth*, 165 Ohio St. 35; *Sutherland v. Kroger Co.*, 144 W.Va. 673.

CONCLUSION

J. For the foregoing reasons, it is respectfully urged that the judgment of the United States Court of Appeals for the Sixth Circuit be reversed and judgment of the District Court on the jury verdict be ordered reinstated.

ARGUMENT

I.

FREEDOM OF THE PRESS IS SUBJECT TO COMPLIANCE WITH LAW

Myopic proponents of absolutism in freedom of the press would preempt for any individual, group or corporate publishers, sole right and power to judge journalistic values, regardless of their journalistic objectives. They assume either that every publisher is motivated to seek and air truth, or that a sinner among them will always be exposed by others sharing that absolute right and power. Only through such absolute freedom of the right to publish, it is argued, can a "free society" be maintained. Without such absolutism of right and power in a free press, a "free people .... could not long remain free," declares Senator Alan Cranston (California) in his article, First Means First, Trial Magazine, May/June 1973, p.31.

To paraphrase Shakespeare, "with itself in either eye ..." even the First Amendment's guarantee of freedom of the press can assume so disproportionate a stature as to obliterate from logic's view equally essential rights implicit in freedom. Not the least of cynics would deny justice its historic role in the pattern of our societal fabric. A classic example of resolution of a conflict resulting from an uninhibited, journalistically oriented assertion of First Amendment privilege on the one hand and the societal or public interest in justice based on truth, is the decision of this Honorable Court in *Branzburg v. Hayes*, 408 U.S. 679. "The use of

confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law." (408 U.S. 681-682)

Even the practice of religion is not guaranteed absolute, self-interest license by the First Amendment. Obviously, though it be mandated by a religious concept, cannibalism would require the restraint of our law, based as it is on the right of each person to life, liberty and the pursuit of happiness.

As this honorable Court has sagely observed: ". . . . power, once granted, does not disappear like a magic gift when it is wrongfully used . . . . .Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to the citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief". *Bell v. Hood*, 327 U.S., at 684. . . . .; see *Bemis Bros. Bag Co., v. United States*, 289 U.S. 28, 36. . . . .; The Western Maid, 257 U.S. 419, 433. . . . ."; *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 91 S. Ct. 1999, 403 U.S. 388.

The Fourth Amendment is not of course directed solely against the federal government. It provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated".

The United States Department of Justice in Bivens had argued that the rights of privacy are creations of state and not of federal law, and that only a state action in tort was available to the plaintiff. The Supreme Court rejected the argument, saying (p. 2002):

> "We think that respondents' thesis rests upon an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has been consistently rejected by this Court" . . . . . "And our recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass laws. *Katz v. United States*, 389 U.S. 347 . . . . . ; *Berger v. New York*, 388 U.S. 41 . . . . . ; *Silverman v. United States*, 365 U.S. 505, 511 . . . . ."

Does a private citizen have greater right to invade the privacy of another private citizen that does the federal government? Even though such invasion were expressly authorized by State law, the Fourth Amendment prevents such trespass; *Gambino v. United States*, 275 U.S. 310; *Byars v. United States*, 273 U.S. 28; *Bivens, supra.*

Uninvited, unauthorized violations of one's person, home, property and other private, lawful rights offend both state and federal law.

Nor may states or state agencies ignore the Fourth Amendment's mandate; *Mapp v. Ohio*, 367 U.S. 643.

The protection of the Fourth Amendment is forcefully asserted in all cases where governmental violation involves any physical trespass into the

"protected zone"; *Olmstead v. United States* 277 U.S. 438; *Silverman v. United States* 365 U.S. 505; *Regalado v. California*, 374 U.S. 497; *Clinton v. Virginia*, 377 U.S. 158; *Chapman v. United States*, 365 U.S. 610.

All of the foregoing citations, of course, deal with Fourth Amendment protections in criminal cases; for obviously "unreasonable searches and seizures" are committed during official governmental law enforcement proceedings. However, the rights of privacy are equally guaranteed in our civil law.

The respondent publisher apparently seeks to obtain judicial termination of the right of privacy entirely.

The *Plain Dealer* justifies the actual, uninvited, intentional trespasses into the home and effects of the Cantrell family by its former reporter, Eszterhas (who ignored notices to be deposed in advance of trial, and who, though personally served, made no appearance at trial) and of its photographer, Conway, on the sole premise that the material thus acquired, though substantially fictionalized in its feature article was of "public interest". Even the asserted "public interest", admittedly is secondary to the newsworthiness of the Silver Bridge disaster eight months earlier. No news "happening" attracted the trespassers on the occasion of their unannounced visit.

Not a single photograph, however, in the fictionalized feature spread of August 4, 1968, was of the Silver Bridge, or the scene of the disaster. The article was not newsworthy in any sense whatever; not a single Cantrell child was at the site of the bridge fall on December 14, 1967; nor was any part of the news stories relating to same; nor was the Cantrell home (miles away from the Silver Bridge) implicated therein. Yet the publisher would justify the trespass into the private home and

lives of this family on the "public interest" extension of Sullivan. Because Melvin Aaron Cantrell was, by the tragedy of the previous December projected into the news and into eternity, respondents argue that his family's supposed private moods, thoughts, tastes, habits, dress and dreams, and their home became public property. Respondents urge that uninvited, uninhibited and highly imaginative reporters, fiction writers, and cameramen, have a constitutionally protected right to expose the Cantrells, without permission, to ridicule, embarrassment and humiliation by a highly fictionalized feature article whenever the spirit (or desire for economic gain) moves them so to do. To paraphrase the 23rd Psalm, respondents in effect assert that they have a right ". . . to dwell in the house of Cantrell forever".

Anointed by the Supreme Court with the spreading oil of Sullivan immunity from legal liability for false publication in some circumstances, the *Plain Dealer* now declares its own, private right to an absolute privacy from the eyes of the law, no matter the nature of its trespasses, or the scope or target of its lies. It sees itself as above and beyond the law's reach. It may, it believes, ignore totally the historic "sanctity" of home and family. It may, if it choose, crucify truth. Its so recently declared "immunity" is already conceived and translated by it into "impunity". Who can now gainsay its reporters and cameramen entry into one's home? Who dare deny an Eszterhas access to a closet?; or to indulgence in his flights of fancy as substitute for fact; or his joy in mocking the dead and falsely labelling and demeaning the living? The Cantrells may close their windows and doors to shut out the winds and weather and storms; but no longer is their home a "castle"; no

longer may they maintain locks which may interfere with even uninvited "literary" pursuit. New kings are born that can do no wrong!; a royalty for profit and power without legal or moral restraint!; and supposedly ordained by the First Amendment to the Constitution! A logical sequel to such interpretation of the Constitution would be that any reporter, writer or cameraman who is denied entrance to one's home in similar circumstances may claim damages for interference with a Constitutionally guaranteed federal right!

The Supreme Court, in *Watkins v. United States* 354 U.S. 178, recognizes the right to privacy, stating:

> "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators, or to 'punish' those investigated, are indefensible.
>
> "Clearly, a Congressional investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking.
>
> "We cannot simply assume . . . that every Congressional investigation is justified by a public need that over-balances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to

> insure that the Congress does not unjustifiably encroach upon an *individual's right to privacy*, nor abridge his liberty of speech, press, religion or assembly."

In this important 1957 decision, the Supreme Court thus takes judicial notice of an "individual's right to privacy" in non-criminal proceedings of even the highest public order.

Particularly as it relates to the methods employed in news gathering by mass media of today, it is interesting to note the prophetic observation of Samuel D. Warren and Louis D. Brandeis, in 1890, in their article, "The Right To Privacy", published in the Harvard Law Review: (4 Harv. L. Rev. 193):

> "Instantaneous photographs and newspapers' enterprises have invaded the sacred precincts of private domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house top.' "

What were still frightening prospects 84 years ago, before the advent of telestar, computers, electronic eavesdroppers, recording devices, and the modern presses, radio, television and air-freight distribution now employed by the publishing industries, are stark, brutal realities of today. The "threat" to "invade the sacred precincts of private and domestic life" has too often been outrageously carried out; and only the law of privacy as enforced in our courts stands between the personal right to "freedom" of the individual and the growing and self-engorging "power" of the press.

How Mrs. Cantrell managed her seven children, difficult though it may have appeared to outsiders, was, so long as she violated no law in so doing, strictly

her private affair. The Supreme Court had long ago recognized a mother's right to the "care, custody, management and companionship of her minor children", as being "rights far more precious than property rights"; *May v. Anderson*, 345 U.S. 535; and almost 50 years prior to the invasion of the Cantrell privacy, in *Meyer v. Nebraska*, 262 U.S. 390 (1923) the Supreme Court had declared that the due process clause protected the right "to marry, establish a home and bring up children".

The curiosity of the *Plain Dealer*, its reporter and photographer, and the literary appetites of their reading public could not warrant exposure of the family's private life in the circumstances; a fortiori, where trespass, fictionalization and bizarre distortion of the publication visited upon them extended humiliation.

In *Wisconsin v. Yoder*, 406 U.S. 205, the Supreme Court reaffirmed the right of the "plain people" to be let alone.

II.

THE DECISION OF THE COURT OF APPEALS GROSSLY RESTRICTS THE RIGHT OF PRIVACY.

The learned Court of Appeals for the Sixth Circuit has by its holding dangerously narrowed the right of privacy while unwarrantedly expanding the First Amendment rights of publishers. "Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substi-

tute its judgment for that of the publisher" as to "newsworthiness", says the Court at page 11 of its official opinion. Apparently the Court ignores what it deems to be unimportant violations of law by reporters in such "newsgathering"; and would, contrary to the parameter of lawfulness mandated by *Branzburg v. Hayes*, 408 U.S. 679 in such professional endeavor, equate violation of the right of privacy by uninvited intrusion into one's home on a par with violation of one's private preference to be free from unwanted publicity, as in simple "false light" privacy cases, involving no physical trespass into private residences or premises. Moreover, the Court of Appeals wrongfully assumed that petitioners' right of redress in even a simple "false light" invasion of their privacy by mere publication would have been controlled by *New York Times v. Sullivan*, 375 U.S. 254, disregarding the distinction between public officers, public figures and private citizens not seeking a public forum or other publicity; *Elmer Gertz v. Robert Welch, Inc.* ___ U.S. ___ (decided June 25, 1974)

Perhaps the most devastating effect of the decision of the appellate court is its declaration that the law must give preference to publishers' First Amendment rights over the right of privacy of persons, declaring: "When an invasion of privacy involves publication, the First Amendment must be considered and a mere balancing of rights will not suffice. If there are preferred positions among the rights guaranteed by the Bill of Rights, certainly such priority attaches to freedom of speech and the press rather than to the less explicit and less well defined right of privacy". (page 9 of its official opinion)

Neither the Constitution nor the Bill of Rights guarantee the right to life or define pursuit of happiness. Does such omission mean that henceforth personal freedom does not include such rights? Or must life or personal choice of occupation give way to privileged professions named in the Bill of Rights? Can a reporter kill to obtain news, since the Bill of Rights omits reference to a person's right to live?

Apparently the appellate court was unimpressed by the opinion of the late Justice Louis D. Brandeis who declared: "The right to be let alone is the right most valued by civilized men", *Olmstead v. U.S.* 277 U.S. 438; and the learned Court of Appeals overlooked or misconstrued important guidelines laid down by the Supreme Court which has repeatedly pointed out that the entire Bill of Rights was to be judicially regarded as a bulwark to protect rather than to diminish the right of privacy.

". . . . the First Amendment has a penumbra where privacy is protected from governmental intrusion. . . . . The right of 'association', like the right of belief (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful". *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 1681.

In *Stanford v. State of Texas*, 379 U.S. 476, 85 S. Ct. 506, the Supreme Court had earlier pointed to the "penumbral" guarantees of privacy implicit in the First, Fourth and Fifth Amendments. These guarantees include freedom of conscience and *protection of human dignity*.

III.

PRIVACY IS AS FUNDAMENTAL TO FREEDOM AS A FREE PRESS

The *right* of privacy is of course the very bedrock of personal liberty. While society is formed by men, a free society is clearly formed for man.

"Man alone can freedom know;
by men 'tis not possessed.
Nor on man can men bestow
The instinct which sets hearts aglow
and pulsing in each human breast."

Life itself is quite personal; and in America at least, freedom is its birthright.

Neither the law nor even the Constitution grant man life or freedom. Their great function is to make secure the natural treasures of life and freedom.

It is quite evident that without social order, defined by a Constitution and secured by law, that man's personal, natural rights, may easily be rendered allegorical.

The agencies of government set up by Constitution and laws are intended to assure man's birthrights. The judicial branch of government has often come to grips with the apparent conflict between the natural rights of

man and those of the social order created to protect them. Obviously, it is to man's interest to maintain a strong and effective society within the framework of its Constitution and political laws; but the social strength is to be directed against the erosive assaults which intentionally or unintentionally weaken man's natural rights. For if the most perfect of governmental structures were to become self-perpetuating and impervious to man's individual, personal rights and needs, its reason for existence would have been forfeited.

Freedom of speech is but one of the aspects of freedom of man. Freedom of the press was not Constitutionally thought of in terms of modern corporate, national and international commercial enterprises. When written into the Bill of Rights, it was to protect man as a writer of his thoughts, his dreams, his hopes, his aspirations or his criticisms, whether acceptable or not to his government or to other free men with like right of expression. The medium of such expression, whether individually owned or the property of impersonal commercial entities, relates rather to the reading forum for the free expression than to the right thereof; therefore, the qualified privilege claimed as defense by the corporate owners of the mass media is valid only to the extent they do vicariously become invested with the protected natural right of free expression of the writer, and accommodate such free expression. Moreover, the privilege that is enjoyed by the publisher is prompted by the biblical admonishment that "The Truth shall make you free"; and not by any exception to the basic personal right of the individual to freedom. The interchange of ideas in man's search for Truth, is ideally to be encouraged by the privilege.

"The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others"; *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 1989; *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132-133.

The currency of the *Butts* law is pertinent, because it follows the landmark case of *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, which seemed to project newspapers into the untouchable area of practising religions.

Having caught our wind, as we recovered from the initial impact of Sullivan, we find man still ensconced securely in his heritage of freedom, with only the rights of his public officers and of those who would influence direction of public action redefined. By their very nature, public officers are not private citizens treating with private property by private means. And "public figures" are persons who voluntarily surrender their privacy to assume their roles in public domains. Ergo, their *right* of privacy is surrendered by choice of an alternative.

The Supreme Court reminds all in a post-Sullivan case that freedom of speech, the correlative of freedom of the press, does not include the right to trespass on the property of others, including the property of the public; *Adderley v. State of Florida*, 385 U.S. 39, 87 S. Ct. 242.

Since Sullivan a number of other clarifying decisions have reassured private citizens as to their right of privacy, and to their historic property right in their good names and reputations.

The late and revered Justice Michael Angelo Musmanno, of the Pennsylvania Supreme Court in *Purcell v. Westinghouse Broadcasting Co.*, 191 A.2d 662, 411 Pa. 167, said:

> "A man's good name is as much his possession as his physical property. It is more than property, it is his guardian angel of safety and security, it is his lifesaver in the sea of adversity, it is his parachute when he falls out of the sky of good fortune, it is his plank of rescue in the quicksand of personal disaster".

The *Purcell* decision also recalls with approbation the guidelines promulgated by Chief Justice Bell in the case of *Bogash v. Elkins*, 405 Pa. 437, 439:

> "Freedom of speech is one of the most prized rights of every American, but is not absolute ..... every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. Article I, sec. 7 of the Constitution of Pennsylvania".

The free press is intended to aid man in his judgments, his private determinations, opinions, shaping of values and choices in self-satisfactions from the many options open to his "pursuit of happiness" as well as to help mold his thinking on public issues, events and persons "ordering" or attempting to order his society.

Man's right of privacy on the other hand is his right to be let alone, and his right to live his life without being subjected to unwarranted and undesired publicity; his right to live without interference by the public; his right to bar the idle, the curious, the scandalmongering, the trespassers or others uninvited, be they individuals, institutions or society itself, from his private life, love

and habits as a private citizen and from his family and home, so long as he and they do not become public officers or public figures, and do not themselves seek the publicity; *Souder v. Pendleton Detectives, Inc.*, 88 So.2d 716; *Aquino v. Bulletin Co.*, 190 Pa. Super. 528; *Appeal of Mack*, 386 Pa. 251; *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 3 Cir.; *Bennett v. Norban*, 396 Pa. 151; *Afro-American Publishing Co., Inc. v. Jaffee*, 366 F.2d 649.

IV.

RIGHTS OF PRIVACY ARE GUARANTEED IN OHIO AND WEST VIRGINIA

A right of action for invasion of privacy has long been recognized in Ohio; *Housh v. Peth*, 165 Ohio St. 35; *Cordell v. Detective Publications*, 419 F.2d 989 (6th Cir. 1969); *Young v. That Was The Week That Was*, etc., 423 F.2d 265.

Likewise in West Virginia; *Sutherland v. Kroger Co.*, 144 W.Va. 673, 684, 685; 47 Am. Jur. Searches and Seizures, 73; *Roach v. Harper*, 143 W.Va. 869; *West Virginia State Board Of Education v. Barnette*, 319 U.S. 624; *Copley v. Northwestern Mut. Life Ins. Co.*, 295 F.S. 93.

Of course, the historic "recognition" of the rights of privacy by both States, would not, it is respectfully submitted, give them power to abolish those rights of individual citizens, in view of the Fourteenth Amendment's reach, imposing the mandate of the Constitution's Bill of Rights upon all of the States; although the

Supreme Court, in *Katz v. United States*, 389 U.S. 347 said:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of constitutional protection . . . The protection of a person's *general* right to privacy–his right to be let alone by other people–is, like the protection of his property and of his very life, left largely to the law of the individual states."

V

PUBLIC OFFICIAL, PUBLIC FIGURE, AND PUBLIC INTEREST EXPANSIONS OF THE SULLIVAN RULE HAVE NOT NEGATIVED THE RIGHT OF PRIVACY

The United States Supreme Court, post-Sullivan, has used these reassuring words with approval:

> "Words defamatory of another are still placed in the same class with use of explosives or the keeping of dangerous animals; Prosser, Torts, par. 108, p. 792. . . . ."
> *Curtis Publishing Co., v. Butts*, 388 U.S. 130

Simultaneously with its reaffirmation of the foregoing classic principle, in *Butts*, it reversed a large defamation verdict won by retired General Walker, in *Walker v. Pulitzer Publ. Co.*, 388 U.S. 164, 87 S. Ct. 1996, by finding him to have been by his own choice a "public figure" whose conduct invited the attention of news media, including possible incidental and unintentional untruths in reporting of same.

After having warned publishers in *Butts*, that:

> "Neither the interest of the Publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. . . . .and calculated falsehood places the publisher at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected . . . . ."
> *Butts*, 87 S. Ct. 1990;

thus, emphasizing that CALCULATED FALSEHOOD is still not privileged even as to a "public figure"; nor is it privileged as to public officials if published maliciously (with the new, and not here pertinent definition of malice, requiring "reckless disregard of the falsity"); yet the high Court in *Walker* expanded the Sullivan doctrine, into the hegamonies of as yet undefined "public or social interest and activity". Because General Walker had "thrust himself into the vortex" of an important public controversy, and "both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehood and fallacies' of the defamatory statements, he was declared to have purposefully assumed status as such a "public figure" concerning whose activities and expressions on the public issue, the people were entitled to be informed. If, as he contended, he was defamed by untruths, he could only complain in the civil courts if the untruths were calculated and not error in fact or judgment, or if they were published on improbable and not the usual, reliable authority.

Apparently anticipating the query "When is a person a public figure, so as to shed his birthright and Constitutionally protected privacy?", Chief Justice

Warren suggests the classification include those who "play an influential role in ordering society", and who become "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in the area of concern to society at large"; 87 S. Ct. 1996.

Measured against these vague touchstones, plaintiffs stand well out of the newly designated zone. None were "involved in the resolution of any public question"; and none was famous in any field of endeavor where he or she could or did "shape events. . . of concern to society at large"; nor, indeed, did they play "an influential role in ordering society". Quite the contrary was true.

Certainly, it was never contended that any of the Cantrell family surviving Melvin Aaron Cantrell were public officials.

It was the lot of the Cantrell family to live in the unhurried, uncrowded, off-beat community of Gallipolis Ferry, in the foothills of West Virginia, completely private, completely contented, completely out of the searching cameras, spotlights and curious eyes of the reporters for news media, until the bridge disaster made the crushed remains of Melvin Aaron Cantrell a "matter of public interest", really "hot news". That was in December, 1967.

The uninvited, arrogant invasion of the Cantrell home, several months later, the unforgivable trespass upon the unsuspecting children, and the distorted, false and sensationalized publication exposing them to ridicule has no justification whatever in law. The United States Circuit Court of Appeals, for the Ninth Circuit in the case of *Dietemann v. Time, Inc.*, 449 F.2d 245 declares:

"Investigative reporting is an ancient art; its successful practice long antecedes the invention of miniature cameras and electronic devices. The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.

Defendant relies upon the line of cases commencing with *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 and extending through *Rosenbloom v. Metromedia, Inc.* (1971) 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971) to sustain its contentions that (1) publication of news, however tortiously gathered, insulates defendant from liability for the antecedent tort, and (2) even if it is not thus shielded from liability, those cases prevent consideration of publication as an element in computing damages.

As we previously observed, publication is not an essential element of plaintiff's cause of action. Moreover, it is not the foundation for the invocation of a privilege. Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication. (Cf. Nimmer, "The Right to Speak from Time to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1968) 56 Calif. L. Rev. 935, 957). Nothing in New York Times or its progeny suggests anything to the contrary. Indeed,

the Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds. (E.g., *Time, Inc. v. Hill*, supra, 385 U.S. at 389-390 and 384 n.9.)

No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public being informed. The same rule would encourage conduct by news media that grossly offends ordinary men."

In *Varnish v. Best Medium Publ. Co., Inc.*, 405 F.2d 608, the defendant published an article in a March, 1964 weekly relating to a tragedy occurring in September, 1963, when the plaintiff's young wife killed her three infants and committed suicide. The article portrayed the suicidal wife as having been regarded in the community as the "happiest mother", whereas in fact she had been moody, dejected and depressed for some time. A suicide note which revealed her true state of mind was reported in the article in such manner as to omit reference to her despondency, in apparent design to depict the wife victim only as the "happiest mother". This distortion of fact made the story false. The article being "knowingly false" to the publisher was held to warrant a jury verdict based on invasion of

the husband's privacy, resulting in a compensatory and punitive damage verdict. In sustaining the verdict, the Second Circuit Court of Appeals observed that the murder-suicide occurring six months prior to the publication was a matter of public interest, nevertheless, because the plaintiff pointed out that the article contained fictionalized dialogue attributed to him upon discovery of the tragedy and did not accurately report the condition of mind of the despondent wife, the jury was warranted in finding the article "offensive to persons of ordinary sensibilities" and that the plaintiff's burden under *New York Times v. Sullivan*, 376 U.S. 254 to prove "intention or reckless falsity and offensiveness to persons of ordinary sensibilities" which "represent a proper balancing of the public interest in freedom of expression and the individual interest in privacy", had been met.

PUBLIC INTEREST

The Supreme Court in *Time, Inc. v. Hill*, 385 U.S. 374 held that the opening of a new play (although the play was based on an incident which occurred some three years prior to the article reporting the play's opening) was a matter of public interest, quoting, (p.388) from its own opinion in *Winters v. People of State of New York*, 333 U.S. 507, 510: "The line between the informing and the entertaining is too elusive for the protection of * * * (freedom of the press)", and remanding the case for determination as to whether errors of fact relating to the subject matter background of the play were "reckless falsity". While

the *opening of a new play* was the proper subject for a publication in the public interest, reportorial expansion of the fact of that event into the crime of three years prior thereto, containing error, put the publisher to the test of the *New York Times v. Sullivan* rule. It is to be noted, therefore, that public interest does not of itself cloak the publisher with immunity from liability for invasion of privacy in the unauthorized publication of an article and photographs relating to a person actually involved in an antecedent crime, which at the time of occurrence was unquestionably "hot news" and, as such, a proper subject of public interest in which area the free press has its widest latitude.

In *Time, Inc. v. Ragano*, 427 F.2d 219, the main article was concerned with *organized crime*, admittedly a subject of public interest; however, a photograph of the lawyer plaintiff (known to the publisher) in a group of figures and identified as criminals, was held to assert a proper cause of action for libel.

In *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, the plaintiff hotel had been the *headquarters of a golf classic* and therefore part of a matter of public interest, so as to require "reckless falsity" proof as part of plaintiff's libel case.

In *Wasserman v. Time, Inc.*, 424 F.2d 920 cert. den. 90 S. Ct. 1844, the District of Columbia Circuit reversed the District Court's summary judgment for the publisher and remanded for trial a libel action based on publication of a group photograph of persons called before a grand jury and who had themselves been released on $100,000 bonds, but which group included the plaintiff attorney, known as such to the publisher. Again the subject matter was obviously one of public

interest, and the publication of a "reckless falsity" was a question of fact for the jury.

In *Sellers v. Time, Inc.*, 423 F.2d 887, cert. den. 91 S. Ct. 27 it was held that an article based upon *filing of a lawsuit*, was of public interest so that accurate reporting thereon constituted a complete defense to a libel action, based on Pennsylvania law, without reference to the right of either party under the Constitution.

In *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, cert. granted 397 U.S. 904, 403 U.S. 29 a libel verdict of $25,000.00 compensatory and $750,000.00 punitive (reduced) was returned in favor of a distributor of magazines and against a broadcasting company on the basis of a series of broadcasts in which repeated reference was made to "smut merchants". The Third Circuit Court of Appeals, accepting the District Court's conclusion that "certain of the statements in the two series were defamatory as a matter of Pennsylvania law and, in the circumstances created a jury issue under such law", reversed on the ground that the evidence lacked proof of "reckless falsity" or malice, saying: "Not only did the broadcasts under attack concern subject matter of public interest, but of equal significance they involved broadcasts of "hot news" items, i.e., summaries of the latest news given on the hour and the half hour in reports ranging from ninety seconds to ten minutes". The broadcasts dealt with *current police raids*; and the second series dealt with *institution and development of* a legal action by the plaintiff and two publishers of the news media (all major local newspapers and the local CBS-TV affiliate)

as well as against the City of Philadelphia, its Police Commissioner, and its district attorney.

In *Time, Inc. v. McLaney*, 495 F.2d 565, cert. den. 395 U.S. 922, the Fifth Circuit Court of Appeals after granting of the interlocutory appeal entered summary judgment which had been denied by the District Court, where the plaintiff, a reported organized gambling figure and operator, connected with an international crime syndicate, was assertedly involved in an election in the Bahamas where, inter alia, the operation was taking place. The Court of Appeals held as a matter of law that the subject matter was of public interest, concerning a public figure and that the "reckless falsity" or malice requirements of the *New York Times v. Sullivan* case applied.

The subject matter of *public health* was held to be a public interest in *United Medical Laboratories v. Columbia Broadcasting Sys.*, 404 F.2d 706, cert. den. 397 U.S. 904 so as also to necessitate proof of "reckless falsity" or malice in publication.

It is thus seen that the areas of public interest include "hot news", opening of a play, organized crime, filing of litigation, political matters, and public health. Certainly there are many other areas which can properly be brought into the public interest, so as to be outside the realm of privacy; however, within its protected circle, all who venture uninvited must do so at their peril.

"That which is interesting to the public may not always be in the public interest"; *Johnston v. Time, Inc.*, 321 F.S. 837, 853.

Query . . . . were the children and home of Margaret Mae Cantrell in August, 1968, outside the protected circle?

VI.

THE CANTRELL RIGHTS OF PRIVACY WERE NOT WAIVED IN FACT OR LAW.

The expanded First Amendment rights of publishers under the Sullivan et seq., doctrine give them no license to trespass and, without invitation, to intrude into the effects and premises of even public figures to obtain even truthful facts of public interest; *Dieteman v. Time, Inc.*, supra; and knowing, false reporting or fictionalizing of facts related to a matter of even public interest vitiates the qualified privileges of publishers, so as to warrant both compensatory and punitive damages for affected family members of deceased persons whose circumstances of death constituted "hot news" in the relatively recent but not current past; *Varnish v. Best Medium Publ. Co.*, supra.

A fortiori, where the uninvited trespass and intrusion is into the home of a non-public family member, and the resulting unprivileged publication is false, fictionalized and defamatory, are both compensatory and even punitive damages warranted; for **TRESPASS IS NEVER PRIVILEGED, A LIE IS NEVER PRIVILEGED AND PUBLICATION OF EVEN TRUTH OBTAINED BY TRESPASS INTO PRIVATE PREMISES CONSTITUTES UNLAWFUL INVASION OF PRIVACY**, in such circumstances.

Just as the thief cannot claim legal title to that which he steals, so an intruding and trespassing reporter can get no title or right in the private matters of another; ergo, he cannot pass on any better right to his publisher. In *Afro-American Publishing Co. v. Eli Jaffee*, etc., 366 F.2d 649, 654, the D.C. Court of Appeals states that for invasion of privacy: "An action is maintainable even when all the statements made therein are completely true and accurate.... The right of privacy stands on high ground, cognate to the values and concerns protected by constitutional guarantees"; *Cooley, Torts* (2d ed.); Interference with Privacy, *Restatement, Torts*, sec. 867; *Barber v. Time, Inc.*, 348 Mo. 1199; *Prosser, Torts*, (3rd ed.) sec. 112; *Tehan v. United States* ex rel. *Shott*, 382 U.S. 406.

The private problems of the Cantrell family, including the dirty face of two-year-old Bruiser, were their private rights just as much protected from uninvited exposure by the Fourth Amendment and by the law of privacy as were their private likes and their private thoughts and values. No constitutional power to condemn those rights in the "public interest" were granted to the press by the First Amendment.

Constitutional guarantees of freedom of press are still, primarily for the benefit of citizens generally, and not for the benefit of the press; in that such freedom is necessary to assure to the citizens continuity of an open society; *Time, Inc., v. Hill*, 385 U.S. 374; 87 S. Ct. 543.

Human dignity and conscience have their right to grow in whatever social soil they take root—even in the backward foothills of the mountain area of Gallipolis Ferry, West Virginia; *Stanford v. State of Texas*, 379

U.S. 476; and the public may not intrude through its highest officials; *Watkins v. United States*, 354 U.S. 178; no agency or group within the public, therefore can claim a greater right than the federal government itself, to represent such "public interest" as would in effect repeal the Fourth Amendment.

VII.

TIME, INC. v. HILL, 385 U.S. 374 IS ONLY PARTIALLY APPLICABLE

The appellants' brief, accompanying its post-trial motions below, acknowledged that: "The court correctly charged the jury on the test of *Time, Inc. v. Hill.*"

The admitted "occasion" for the Hill publication was not one that was created or fabricated by Time, Inc. or its reportorial staff; it was the opening of a new play on Broadway, and as such was newsworthy and of legitimate public interest. The complaint of the Hill family relied on their asserted civil rights under a New York statute hereunder referred to. The article was in nowise defamatory to the Hill family; contrariwise, it ascribed to them heroic acts and qualities not warranted by the facts. The historic, newsworthy event which projected the Hills into the area of public interest had, together with similar true experiences of others, inspired the playwrite to dramatize and embellish the situations into an intensely fictionalized theme incorporating non-factual elements of violence, lust and heroics first depicted in a best-seller book. That such "poetic license" is a legitimate attribute of creative writers cannot be questioned.

The convicts who had restrained the Hill family in their home, were depicted as cruel, lustful and mean, contrary to the facts in the actual Hill experience; and these elements of untruths, in no way reflecting adversely on the Hills, were the sole basis for charging falsity in reporting by Time, Inc.

Actually, were the Hills not "protected" by a statute of New York State requiring their consent in the use of their names, the case should have been dismissed as failing to establish an action for invasion of privacy. It was not dismissed, however.

The sole basis of the Hill suit against Time, Inc., was that under a New York Civil Rights statute, forbidding unauthorized commercial use of names or photographs of actual persons without their consent, their names were used in a "fictionalized" story of their experience without their consent. Aside from its title, the statute makes no reference whatever to the "right of privacy"; and it is particularly significant that, although urged by Time, Inc., so to do, the Supreme Court refused to hold the statute unconstitutional, saying (385 U.S. 396):

> "The appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity. Such a declaration would not be warranted even if it were entirely clear that this had previously been the view of the New York courts. The New York Court of Appeals, as the Spahn opinion demonstrates, had been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press. We, therefore, confidently expect that the New York courts will

> apply the statute consistently with the constitutional command. Any possible difference with us as to the thrust of the constitutional command is narrowiy limited in this case to the failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article."

The text of the statute is reprinted as a footnote in the case. It is herewith reproduced for the purpose of comments thereon which will follow. The complete text of the *New York Civil Rights Law Par. 50-51* is as follows:

Par. 50. Right of Privacy

> "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

Par. 51. Action for injunction and for damages

> "Any person whose name, portrait or picture is used within this state for advertising purposes of trade without written consent first obtained as above provided, may maintain as equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name portrait or picture in such manner

as is forbidden or declared to be unlawful by the last section, the jury in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith."

Obviously, the New York statute deals solely with the unauthorized use of an actual person's name or photograph in advertisements or "for the purposes of trade". Notably, the Supreme Court observes that: ..."the statute gives him a right of action when his name, picture or portrait is the subject of a 'fictitious' report or article."(p. 384); nor does the Supreme Court find fault with permitting recovery under the statute providing that the trial judge properly charge the jury that: "... a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article."(p. 397)

To summarize Time, Inc. v. Hill, therefore, it appears that:

1. The right to privacy is recognized as a fundamental, personal, constitutionally protected privilege of man in our so-called free society.

2. The right to privacy includes personal authority over one's name or likeness so as to require his consent to publication thereof in any article not "hot news" or relating his involvement in a matter of "public interest" or "public concern"; however,

3. Even if the article involves a matter of "public interest" (such as the opening of a new play) WHERE IT CONTAINS UNTRUTHS WHICH ARE FICTITIOUS BUT NOT DEFAMATORY, if published without his consent and knowingly or with reckless disregard of the truth or falsity thereof, the person named, or portrayed (THOUGH HE WAS HISTORICALLY PROJECTED INTO AN AREA OF PUBLIC INTEREST SO AS TO THEN MAKE HIM AN INVOLUNTARY PUBLIC FIGURE) may recover damages from the publisher.

The present case is, of course, similar to *Time, Inc. v. Hill* ONLY in that:

1. The article complained of contained untruths.

2. The article complained of was published without consent, containing the names (and herein also likeness of plaintiff's family and home at their very worst.)

The present case is *unlike Time, Inc., v. Hill* in that:

1. Defendants actually INTRUDED into the Cantrell premises to take the photographs of plaintiff's infant children and of her home, without the invitation, knowledge or consent of plaintiff.

2. Defendant's fictionalized article, containing the names and photographs of plaintiff's children and her home, was HUMILIATING AND DEFAMATORY IN BOTH WRITING AND PICTURES, resulting in their extended emotional hurt and distress.

3. None of the children or the Cantrell home were historically in the news.

4. The occasion of publication was NOT RELATED TO A CURRENT, NEWSWORTHY EVENT, such as the opening of a play.

The Supreme Court remanded in *Time, Inc. v. Hill* because the District Court erred in giving its charge.

Counsel for respondents herein was gracious enough to observe that such error is absent in the within record.

It is respectfully submitted that under the charge of the District Court, the jury was more than warranted in finding that the defendant's intrusive invasion into the family privacy of Margret Mae Cantrell was reckless, and that the publication in its "hillbilly" theme containing distortions and untruths, was either agreed upon in advance by the editors, or at the very least was ratified and approved with reckless disregard as to the truth of the contents, only its attractiveness thereof as a "feature story" for its readers being the concern of the Sunday editor.

"Recklessness is an inference of fact to be drawn from the evidence offered, and is a matter for the determination of the jury, . . . "; 76 C.J.S. Reckless, Recklessly, Recklessness, p. 68.

Recklessness need not involve wanton or willful conduct; *Russell v. Turner*, 148 F.2d 562, 565; McCoy

v. Faulkenberg, 53 Ohio App. 98; *White v. Hall*, 118 W.Va. 85.

In note 7, page 383 of *Hill*, the Supreme Court pointedly observes that even though the publication's truth concerning a newsworthy event may be a defense under the New York statute as interpreted by the Supreme Court of Appeals of that State, nevertheless:

> "7. This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where "revelations may be so imitmate and so unwarranted· in view of the victim's position as to outrage the community's notions of decency." Sidis v. F-R Pub. Corp., 113 F2d 806, 909 (C.A.2d Cir.) cert. denied, 311 U.S. 711 61 S.Ct. 393, 85 L.Ed. 462 (1940). Cf. Garner v. Triangle Publs., Inc., 97 F.Supp. 546, 550 (S.C.S.D.N.Y.1951); res Restatement, Torts, par. 867 comment d (1939). See Id., illust. 6. This case presents no question whether truthful publication of such matter could be constitutionally proscribed."

The jury was, of course, warranted in the within case in finding that the publication, added to and resulting from, the intrusive invasion of the Cantrell family privacy did indeed "outrage the community's notions of decency"; as witness the articles printed in the other newspapers expressing the community's outrage. (Plaintiff's Exhibit 7, App. II, p. 11)

The subliminal thinking of the Justices of the Supreme Court in *Time v. Hill* may well have been revealed in its instructive note 7, supra, setting forth a series of federal and state cases dealing with liability aspects in privacy cases. Where the "invasion" complained of is only by unauthorized use of a non-public

figure's likeness or name, it appears that the test of liability is whether the occasion, event or subject matter legitimately "concerns" the public. If legitimate public concern is lacking, even though completely true, the person named has a cause of action. The Supreme Court refers to *Afro-American Publishing Company v. Jaffe*, 366 F2d 649, wherein the Circuit Court of Appeals for the District of Columbia has (p. 653) alluded to the *Restatement of Torts, par. 867* which holds that a person "who unreasonably and seriously interferes with another's interest in not having his affairs known to others" is liable for invasion of the offended person's privacy. The Circuit Court further held that "An action is maintainable even when all statements made are completely true and accurate .... The right of privacy stands on high ground, cognate to the values and concerns protected by Constitutional guarantees", citing *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 wherein the Supreme Court pointed out that both the Fourth and Fifth Amendments are concerned with "constitutional values ... reflecting the concern of our society for the right of each individual to be let alone." ... and commenting that: "The Court also spoke in terms of 'the Constitution's concern for the essential values represented by our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life".

The District of Columbia Circuit Court cited "other references to the existence and importance of a zone of privacy established by constitutional guarantees" as *Mapp v. Ohio*, 367 U.S. 643; *Griswold v. Connecticut*, 381 U.S. 479; *DeGregory v. Attorney General of State of New Hampshire* 383 U.S. 825.

In Mapp, supra, a criminal conviction was reversed because the evidence was obtained by police officers in private premises without a lawful warrant.

In DeGregory, the Supreme Court cited its holdings in *Watkins v. United States*, 354 U.S. 178, 197 in the following:

> "The First Amendment may be invoked against infringement of the protected freedoms by law or by law making .... Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy ....There is no showing of "overriding and compelling state interest." ....that would warrant intrusion into the realm of political and associational privacy protected by the Fifth Amendment".

It is respectfully submitted, therefore, that the Supreme Court's footnoted reference embodied in note 7 in *Time, Inc. v. Hill* are intended as a reaffirmation of its strong advocacy of and protective interest in the right of privacy, with its "protected freedoms" indigenous to America; and in the evolving body of legal principals dealing with the equally sacred and protected freedom of man to utter and print his thoughts, since New York Times v. Sullivan, the High Court has no intention of undermining or weakening the foundation on which individual freedom must be built, one's right to be a truly "private citizen", unless history, circumstance, uncontrolled events or personal choice project him into the realm of legitimate public interest or concern.

Moreover, the Supreme Court in Time, Inc. v. Hill did not do what the defendant here suggests, i.e., disregard a proper jury verdict on a proper charge.

The First Amendment's guarantee of a free press is not intended for newspapers and magazines alone, of course, but is one of the fundamental rights of freemen as individuals; yet, where such right was used by obtrusive mail peddlers of erotic literature, without permission of the addressees, the Supreme Court, in the recent decision of *Rowan v. United States Post Office*, 38 U.S.L.W. 4343, unanimously upheld a statute authorizing such addressees to require that their names be omitted from the lists of the publishers. The Supreme Court held that the individual's right "to be let alone" completely outwieghs the mass-mailer's right to communicate.

VIII.

THE CRITICAL ISSUES OF TRUTH, OFFENSIVENESS, INTRUSIVENESS AND RECKLESSNESS ARE MATTERS FOR JURY DETERMINATION

Consent is a question of fact for the Jury's consideration. Schneckloth v. Bustamonte, 93 S.Ct. 2041. The jury here specifically found there was no consent to either the uninvited trespass or the publication.

The American Law Institute's Section 652D of its new provision for the invasion of privacy in Restatement (Second) of Torts, deals, inter alia, with "Publicity Given to Private Life", quoting as follows:

> "One who gives publicity to matters concerning the private life of another, of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy." Tent. Draft No. 10 to 13, p. 113

To illustrate the principle, the following example is given:

> "'A' publishes a book describing the life and peoples of a backwoods community. In this book 'A' portrays in detail the conduct and character of 'B', a woman living in the community and identified her by name. The book reveals intimate details as to 'B's peculiar appearance . . . (etc.) to which the ordinary reasonable woman would strongly object to having made public. 'A' has invaded the privacy of 'B'." Comment D, Illustration 11, p.115

Dean Prosser's example of what could constitute a cause of action, classically describes the Cantrell case. Moreover, his use of the term "highly offensive to a reasonable man" necessarily implies that, under proper charge of the Court, the fact finder must weigh the evidence on the issue of offensiveness.

Webster's unabridged, Twentieth Century Dictionary defines "news" as "recent happenings"; and "newsworthy" as "having the quality of news". Further, the word "happening" is defined as "something that happens"; and "happen" as "to occur or befall by chance or without plan". Under these definitions, the Cantrell story was not concerned with "news", and was therefore not "newsworthy", so as to come within any of the areas of qualified privilege suggested by the astute counsel for the respondents.

The testimony clearly established that the very concept of the offensive story was the suggestion of Eszterhas to his then doting editors; and the prominence (largest single article) in the defendant's Sunday feature magazine without even checking the Plain Dealer's "morgue" files for accuracy, was evidence that the only "happening" was the story itself, a well-planned and substantially fictional creation.

From the "Hill Folk" reference in the morgue file's burial account shortly after the tragedy, to the "We're hillbillies" subtitle under the photograph of William David Cantrell and his sister, in the 1968 feature article, Eszterhas characterized the Cantrells as backwoods, uncultured, preternatural human freaks who, in their withdrawn and limited development epitomized a community of freaks, bereft of human sensitivities and love – indeed "little to live for".

Apparently not satisfied with the factual accounts contained in the news stories of the disaster, and seeking a "more interesting" angle as the basis for his undertaking for profit, Eszterhas decided to "drop in" on the unsuspecting Cantrell family; and he struck what for him amounted to a bonanza. Mother Cantrell was away, so his invasion was uninhibited. The camera eye of the Plain Dealer's feature pages was filled with the unprepared and uncombed scenes of the private family; and personal details theretofore hidden in the Gallipolis Ferry hills, and protected from exposure only by the Cantrell's right to be "let alone" were published in about half a million Sunday *Plain Dealers*. With such evidence, the jury was amply fortified in its finding that the invasion was a complete trespass, and the

publication of the camera's ill-gotten products a very reckless act indeed.

In *Time, Inc. v. Ragano* 427 F2d 219, 221, the article complained of was a bona fide news story; but the Fifth Circuit Court of Appeals affirmed the District Court for the Middle District of Florida in denying the publisher's motion for summary judgement on lack of evidence of malice saying:

> "The record, which consists of affidavits, exhibits and depositions, shows that all of the Time staff knew that Ragano was an attorney from the "bio" files Time Inc., had on him." . . . "In view of the principle that all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion for summary judgment, e.g., United States v. Diebold, Inc., 1962, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176; Gross v. Southern Ry. Co., 5 Cir. 1969, 414 F.2d 292, and in light of the fact that all the Time, Inc., employees knew that Ragano was an attorney, we think that a genuine issue of material fact exists as to whether Time's conclusion that Ragano could journalistically be referred to as a top Cosa Nostra hoodlum was made in good faith or with malice. Therefore, summary judgment was denied. Fed. R. Civ. p.56"

The foregoing decisions are in accord with the case of *Blount v. T.D. Publishing Corp.*, 423 F.2d 421 (N.M. 1967).

In that case the Court held:

> "Where the individual's right of privacy is concerned and where the right of the public to be informed is involved, the question of fact should be resolved by the trier of the facts."(p. 424)

IX.

THE VERDICT WAS NOT EXCESSIVE

Respondent's frank and uncompromising statement of accord with the charge based upon Time, Inc. v. Hill, suggests that the case be also a proper guide as to the measure of damages herein.

Although the Hills, male heroes in the article and in nowise defamed, asked compensatory and punitive damages only because they did not consent to the use of their names; the verdict for the husband was $50,000 compensatory and $25,000 in punitive damages. The wife received a verdict of $75,000 compensatory and $25,000 in punitive damages. The Cantrells by comparison were awarded only $45,000 and $15,000 each as compensatory damages, despite the trespass into their home, the extensive feature publication and the distress and humiliation caused thereby.

Obviously the plaintiffs were entitled by the Seventh Amendment to the Constitution to a jury trial; and the appellant's real complaint was with the jury's verdict. This in itself is no ground for either n.o.v. or for a new trial; *Simler v. Conner*, 372 U.S. 221; *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160; *Fitzgerald v. United States Line Co.*, 374 U.S. 16; *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500; *Dick v. New York Life Ins. Co.*, 359 U.S. 437.

It is exclusively within the province of the jury as the fact finder to determine all of the issues which were submissible and upon which testimony was offered. Even were the Court to believe that evidence as to any of the factual issues was weak or slight, it would still lie

within the jury's exclusive province to judge, to accept or to reject such evidence; *Basham V. P.R.R. 372 U.S. 699; Rogers v. Missouri-Pacific Railroad, 352 U.S. 500; Lavender v. Kurn, 327 U.S. 645; Gallick v. Baltimore & Ohio Railroad, 372 U.S. 108; the Seventh Amendment to the Constitution.*

The strong mandate of the United States Supreme Court, as gleaned from its decision, which defines federal policy on questions of fact and credibility, leaves little discretion for a trial judge in this area, holding that such evidence must be submitted to the jury. Judge Friendly, in an opinion for the Second Circuit Court of Appeals in the case of *Herman Schwabe, Inc. v. United Shoe Mach. Corp.* 297 F2d 906, 912, cert. den. 369 U.S. 865 (1962) said:

> "There is no bright line that divides evidence worthy of consideration by a jury, although subject to a heavy counter-attack, from evidence that is not. Especially because of the guarantee of the *Seventh* Amendment, a federal court must be exceedingly careful not to set the threshold of the jury room to high."

Moreover, proof of special damages is not required where even a technical trespass is involved in obtaining information breaching privacy; Dietemann v. Time, Inc. 449 F2d 245, 247; Roach v. Harper, 143 W.Va. 869; Pearson v. Dodd, 410 F2d 701, cert. den. 395 U.S. 947.

X.

CONCLUSION

Wherefore, it is respectfully submitted that the Cantrell family, being neither public officials nor public figures, and their home and family life being exclusively their private property and rights, the physical intrusion into their home by the publisher's reporter and photographer constituted such trespass as to foreclose respondent's First Amendment rights to photograph and thereafter to publish even a true account of the facts; and that their false and fictionalized publication, stripped by the trespass of the protection of any privilege, under the circumstances, warranted the verdict and judgment of substantial damages. Accordingly, it is respectfully urged that the judgment of the United States Court of Appeals for the Sixth Circuit be here reversed and the judgment of the District Court reinstated.

Respectfully submitted,

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I hereby certify that I have mailed a copy of the within brief to Smith Warder, Esq., attorney to for the respondents, to his office, 1144 Union Commerce Bldg., Cleveland, Ohio 44115, by direct mail, postage prepaid, this 25th day of July, 1974.

Harry Alan Sherman

Attorney for plaintiffs

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5520

MARGARET MAE CANTRELL, *et al.*,

Petitioners,

v.

FOREST CITY PUBLISHING COMPANY, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court of Appeals to the Sixth Circuit

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United States Constitution Cited

First Amendment 2, 5, 9, 13-15

Other Authorities Cited

William L. Prosser, Privacy, 48 Cal. L. Rev. 383 (1960) 6, 13

Warren and Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193.....6, 12, 13

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BRIEF FOR RESPONDENTS

Preliminary Statement

The Opinion Below

The opinion of the Court of Appeals for the Sixth Circuit appears in 484 F. 2d 150.

Jurisdiction

Jurisdiction is as stated in Petitioners' Brief. It is not contested.

Constitutional Provisions Involved

The case involves the First Amendment of the Constitution of the United States which provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Question Presented for Review

Does the First Amendment protect publication of a non-defamatory newsworthy article from a claim for "false light" invasion of privacy absent proof of calculated falsehood?

The Court below answered this question in the affirmative and remanded for entry of judgment in favor of defendants.

Statement of the Case

A. The Facts

On December 14, 1967, the Silver Bridge connecting Ohio with West Virginia collapsed into the Ohio River. This tragedy resulted in the loss of 44 lives and was the subject of widespread public

interest and concern (Pltf. Ex. 1). Among those killed were Mel Cantrell and Cecil Counts, passengers in a car driven by Margaret Cantrell, who miraculously survived (A. 15). The following day, The Plain Dealer sent reporter Eszterhas to cover the story. During the course of this assignment, Eszterhas met Margaret Cantrell—one of the 18 survivors of the tragedy—and attended the funeral of her deceased husband, Mel Cantrell (Deft. Ex. 2). Eszterhas interviewed the survivors of the bridge tragedy and members of the family of those who were killed (Pltf. Ex. 1). As a result of this on-the-scene investigation Eszterhas wrote an article published in The Plain Dealer for which he was awarded an annual prize presented by the Press Club of Cleveland (A. 67-68). He also shared in an award given by the Ohio Associated Press Society of Columbus, Ohio, for the coverage of this story (A. 69).

On a weekend in May, 1968—five months later—Eszterhas returned to the scene of the tragedy at Point Pleasant, West Virginia, accompanied by a photographer, Richard Conway, to ascertain the effects of the Silver Bridge tragedy on those directly involved. They went to the Cantrell family (A. 45, 62, 75). While at the Cantrell home Eszterhas interviewed, and Conway photographed (A. 78), those members of the family who were present. The impressions of this interview and the photographs taken were published in the August 4, 1968 issue of The Plain Dealer (Pltf. Exh. 1).

B. Pleadings and Motions

The complaint alleged that the privacy of the plaintiffs had been violated by the intrusion of the

newsman and photographer, for unreasonable publicity about their private lives and for falsely presenting their condition and making them objects of pity and ridicule. Mrs. Cantrell brought suit for herself and all of her children, but all plaintiffs except Mrs. Cantrell and one son, William David Cantrell, were dismissed by the Court. The complaint also charged the defendants with "malicious and defamatory libel". As developed by the evidence the intrusion complained of consisted of publication of an article which placed the Cantrell family in a bad light because of its inaccuracies and untruths. This is the way the matter was presented to the jury and there was no complaint on appeal concerning the jury charge (A121-2).

At the conclusion of the plaintiffs' case, in response to a motion for a directed verdict on behalf of all the defendants, the District Court found "that there has been no evidence to support the charges that the invasion of privacy, if in fact an invasion of privacy occurred was done maliciously within the legal definition of that term". The District Court then ordered stricken all allegations relating to punitive damages, and dismissed as to several infant plaintiffs, but denied the motion for a directed verdict as to Petitioners (A. 119).

C. Holding Below

Although Mrs. Cantrell and her son were displeased with the article published by the Plain Dealer and the article was not as carefully written as it should have been, nevertheless there was no proof that the Forest City Publishing Company printed and distributed the article with any knowledge of the falsities contained in it or in reckless

disregard of whether or not it was true. Absent a calculated falsehood, the publication or broadcast of material concerning an event of public interest may not result in the imposition of a judgment for damages because of falsehoods or distortions arising from negligence or poor reporting. The failure of the defendant Forest City Publishing Company to verify the factual assertions in the story is not condoned, but there was no evidence of calculated falsehood (A. 130).

Summary of The Argument

A. Of the four complex torts involved in an invasion of the right of privacy, we are concerned only with the "false light" theory. This Court, and the lower courts, have consistently accommodated the individual's right of privacy to the First Amendment guaranty of the freedom of the press concerning newsworthy events.

B. This case was tried on the "false light" theory under the principles of *Time* v. *Hill*. The lower courts found no evidence of a calculated falsehood. Therefore petitioners have no cause of action.

C. The newspaper has a duty to publish and the public is entitled to know about newsworthy people and events taking place in the nation and in the community. The article is not offensive. Nothing stated in the article would alert a reasonably prudent editor of prospective liability. Applying the principles of *Time* v. *Hill*, the Court of Appeals properly held that petitioners have no basis for a "false light" invasion of privacy action. Standards less stringent than established in *Time* v. *Hill* would chill an editor's desire to publish newsworthy articles of community and public concern. A newspaper is more than a

passive receptacle or conduit for news and comments. The choice of material to go into a newspaper, and the decision making process concerning the content of the article and other problems constitutes the exercise of editorial control and judgment which should not be burdened with the impossible task of verifying to a certainty, the facts asserted in news articles, particularly as related to non-defamatory matter.

ARGUMENT

A NON-DEFAMATORY NEWSPAPER ARTICLE CONCERNING NEWSWORTHY PERSONS, EVENTS AND ISSUES IS NOT ACTIONABLE ABSENT PROOF OF CALCULATED FALSEHOOD.

A. The Nature of the Tort

This is an action for invasion of privacy. From 1890,[1] to this Court's decision in 1967 on the opening of a New York City play,[2] to the aftermath of the Silver Bridge tragedy and the report of the family of one of the victims,[3] we witnessed the gradual accommodation of one's right of privacy to the report of newsworthy events and persons claimed to be depicted in a false light to the public.

In the leading modern treatise on the subject,[4] Dean Prosser traced the history of this right of privacy and observed:

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[1] Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193

[2] *Time, Inc.* v. *Hill*, 385 U.S. 374 [1967]

[3] 484 F. 2d 150; see Petitioner's Exh. 1

[4] William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 [1960]

"It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley 'to be let alone'. Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation for the defendant's advantage, of the plaintiff's name or likeness." (48 Cal. L. Rev. 389.)

As noted by the Courts below, this case was tried as a "false light" case—as was the "fictionalization" in *Time, Inc.* v. *Hill*—subject to this Court's falsity standard enunciated in *Time, Inc.* v. *Hill*, (385 U.S. 374). The case does not involve: (a) "intrusion" and claimant's rights deriving from the Fourth Amendment; (b) sensational disclosure of private facts offensive to public mores; or (c) "commercialization" of a person's identity. It does involve the tension between personal privacy and the First Amendment. Resolution of this issue will determine the future of newspaper articles regarding the myriad of problems which make the reader aware of the concerns of society and his community.

In *Afro-American Publishing Co.* v. *Jaffe*, 366 F. 2d 649 (1966), the District of Columbia Circuit Court of Appeals sitting en banc discussed the elements of the tort and the respective rights of the parties in a case of unwanted false light publicity:

> "[A cause of action for invasion of privacy] represents a vindication of the right of private personality and emotional security, the essence of the interest protected being aptly summarized in Judge Cooley's perceptive phrase, 'the right to be let alone'. The historic 1890 article of Louis D. Brandeis and Samuel Warren stressed the need for solitude and privacy as a counterpoise to the intensity and complexity of contemporary civilization. That was written at a time when privacy was imperiled by the rise and conspicuous success of the yellow journalism of the 19th century. The action is no less imperative under the conditions of today, when privacy is imperiled by the communications explosion, and by a deplorable eruption of all manner of mechanical and electronic devices for snooping.
>
> "However, the right of privacy is not an absolute. The Restatement of Torts states that liability attaches to a person 'who unreasonably and seriously interferes with another's interest in not having his affairs known to others'.
>
> "An action is maintable even when all statements made are completely true and accurate. Different patterns of interference are reflected in the cases, and a variety of sub-doctrines have evolved. The right of privacy stands on high ground, cognate to the values and concerns protected by constitutional guarantees. But this must be accommodated to the need for reasonable latitude for

> the selection of topics for discussion in newspapers. That right of the press, likewise supported by constitutional guarantees, is crucial to the vitality of democracy. The courts are called upon here, as elsewhere in the law, to harmonize individual rights and community interests. In appraising challenged violations of privacy a 'distinction can be made in favor of news items and against advertising use'.
>
> "We think the trial court erred in finding that the case at bar involved an actionable invasion of privacy. When a proprietor of a news vending outlet in a predominently Negro neighborhood discontinues the handling of a newspaper oriented to Negro readers, the matter is appropriate for newspaper discussion, with pictorial accompaniment, without fear of an overhanging action for invasion of privacy." (Footnotes omitted)

The following year this Court, cognizant of the thinking of hundreds of Courts—both State and Federal—and the divergent views of legal writers since 1890, handed down its decision in *Time, Inc.* v. *Hill* as an accommodation between the right of privacy and the First Amendment's right of the people to know in a situation of a non-defamatory, albeit false, publication concerning newsworthy events. Absent the New York statute, factual and legal issues brought to this Court in this case are identical to those presented in *Time, Inc.* v. *Hill*.

B. Petitioners Did Not Establish A "False Light" Invasion of Privacy by Publication

This action was tried on the sole theory that an individual's right of privacy was invaded where there is pub-

licity which unreasonably places him in a false light in the public eye (484 F. 2d 150, 153). The Courts below proceeded on, and were guided by this Court's holding in *Time, Inc.* v. *Hill*, 385 U.S. 374, that:

> "the constitutional protections for speech and press preclude the application of the New York [right of privacy] statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." (385 U.S. at 387-388)

The Appellate Court below found that the article was newsworthy and that there was no evidence of publication "with knowledge of the falsities contained in [the article] or in reckless disregard of whether or not [the article] was true". It held:

> "Absent calculated falsehood the publication or broadcast of material concerning an event of public interest may not result in the imposition of a judgment for damages because of falsehoods or distortions arising from negligence or poor reporting. The failure of the defendant, Forest City Publishing Co., to verify the factual assertions in the story is not condoned but there was no evidence of calculated falsehoods." (A 130)

In such cases, as here, a newspaper should not be held liable for invasion of privacy arising from publication of a non-defamatory article placing a person in a false light without proof that the article was published with knowledge of its falsity or in reckless disregard of the truth.

C. The Standard Set by This Court in *Time, Inc.* v. *Hill* Is Reasonable And Constitutionally Operable. A Lesser Standard Would Impose a Chilling Restraint on the Publication of Newsworthy Events

This Court recognized the nature of the burden imposed on the press and the resulting Constitutional impairment which would result from a test of liability less than the standard of *Time, Inc.* v. *Hill*, 385 U.S. 389:

> ". . . We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, *particularly as related to nondefamatory matter.* Even negligence would be a most elusive standard, *especially when the content of the speech itself affords no warning of prospective harm to another through falsity.* A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portait." (Emphasis added)

The reasoning of the Court below accommodates the competing rights of persons to their privacy with the right of the public to know and the right of the press to publish non-defamatory newsworthy items.

This accommodation is not based upon negligence but rather upon whether the events or the persons involved are "newsworthy."

> ". . . [D]espite vigorous efforts to avoid publicity, some people remain newsworthy because of

circumstances which arouse a legitimate interest in their lives . . . The judgment of what is newsworthy must remain primarily a function of the publisher. However, in cases where essentially private persons are the subject of publicity because of the involuntary connection with events of widespread interest, this discretion or judgment of the publisher cannot be absolute. The curiosity and voracious appetite of the public for scandal would be too easily exploited by unscrupulous publishers. The right of the public to know is clearly one of the primary values protected by the First Amendment and Its '. . . guarantees are not for the benefit of the press so much as for the benefit of all of us'. *Time, Inc.* v. *Hill, supra* at 389 . . . Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher." (484 F. 2d 156-7).

From the beginning, newsworthiness has been recognized as a legitimate limitation on the right of privacy:

> "The right of privacy does not prohibit any publication of matter which is of public or general interest." (Warren and Brandeis, *The Right of Privacy,* 4 Harv. L. Rev. 193, 214 [1890])

This was recognized by Dean Prosser as follows:

> "Caught up and entangled in this web of news and public interest are a great many people who have not sought publicity, but indeed, as in the case of the accused criminal, have tried assiduously to avoid it. They have nevertheless lost some part of their right of privacy. The misfortunes

> of the frantic woman whose husband is murdered before her eyes, or the innocent bystander who is caught in a raid on a cigar store and mistaken by the police for the proprietor, can be broadcast to the world, and they have no remedy. Such individuals become public figures for a season; and until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims. The privilege extends even to identification and some reasonable depiction of the individual's family, although there must certainly be limits as to their own private lives into which the publisher cannot go." William L. Prosser, *Privacy,* 48 Cal. L. Rev. 413-414 [1960] (footnotes omitted).

This limitation was noted by this Court in *Garrison* v. *Louisiana,* 379 U.S. 64:

> "Even the law of privacy . . . recognizes severe limitations where public figures or newsworthy facts are concerned." (379 U.S. 73, fn. 9)

Certainly the right of the people to know and the rights of the press to publish require that, where a newspaper comments on persons involved in a newsworthy event and such comments are, as here, within the range of the facts or issues arising out of or resulting from such event, priority be given these First Amendment rights rather than "the less explicit and less well defined right of privacy". (A 127)

The *Gertz* standard of liability for libel *per se* should not be adapted to causes of action for false light invasion of privacy since the content of the article does not warn

an ordinarily prudent editor of its actionable potential (*Gertz* v. *Welch*, —— U.S. —— 42 LW 5131). If the States may establish standards of liability which could be something less than the *Time, Inc.* v. *Hill* standard, the freedom of the press to publish newsworthy articles of social concern will be destroyed. And this is so because the most knowledgeable editor may not be able to detect error in a non-defamatory article, whereas his journalistic antennae alert him to key defamatory words or concepts.

This Court, and the lower Courts which will be required to distinguish the "public" status of the claimants and to hone the concept of "actual injury" (*Gertz* v. *Welch*, U.S. 42 LW 5131) will have struggled mightily, but in vain, if the carefully structured Constitutional balance made operative in libel actions may be sidestepped by pleading the same facts in the guise of a claim for "false light" invasion of privacy. The right of the people to know is not served, and freedom of the press is not guaranteed, if, as in this case, Courts determine that a newspaper article is not defamatory, and the defendants had no knowledge of inaccuracies allegedly contained in the article, and, nevertheless, a jury is permitted to award chilling damages for "false light" invasion of privacy.

Where a person becomes newsworthy by being connected with a newsworthy event, this person has no "right of privacy" with regard to, or in connection with, the facts, circumsances and issues concerning or flowing from such event. What might otherwise be construed as an *unwarranted* intrusion into one's private affairs becomes *warranted* by the connection of the person with the event, giving rise to the newspaper's Constitutional right to publish articles concerning newsworthy events. The broadest protection afforded by the First Amendment

should be applied "to assure the freedom of speech and press that 'breathing space' essential to their fruitful exercise". (*Gertz* v. *Welch*, ——US——, 42 LW 5129; *NAACP* v. *Button*, 371 U.S. 415 (1963). As the Court below appropriately stated:

> "If there are preferred positions among the rights guaranteed by the Bill of Rights, certainly such priority attaches to freedom of speech and the press rather than to the less explicit and less well defined right of privacy." (A 127)

In this invasion of privacy action, there is no defamatory publication, no calculated falsehood, no commercialization or (contrary to Appellants' contentions throughout their Brief) trespass (484 F. 2d 150, 153, 154-5). It is submitted that in the absence of one of these elements, the First Amendment precludes recovery.

CONCLUSION

The determination below should be affirmed.

Whether this Court (a) adopts the standard that newspapers may publish articles free from defamatory or calculated falsehood without fear of civil litigation; or (b) reannunicates the *Time, Inc.* v. *Hill* standard as applied by the Court below, there is no evidence in this case—and there is nothing in the article complained of to alert a knowledgeable editor—that the article was published with the knowledge of its falsity or with reckless disregard of the truth. The judgment of the Court below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

73-5520

MARGARET MAE CANTRELL, *et al.*,
Petitioners,

v.

FOREST CITY PUBLISHING CO., a corporation, JOSEPH ESZTERHAS and RICHARD T. CONWAY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENTS

I.

RESPONDENTS' ARGUMENTS CONTAIN MISSTATEMENTS, INACCURACIES AND BASELESS LEGAL CONCLUSIONS.

From the Summary of Argument (Resp. Brief, p. 5) through the Conclusion (Resp. Brief, p. 16) Respond-

ents' Brief misleads through misstatements, inaccuracies and baseless conclusions as to both factual and legal issues involved in the within case.

The case was not, as stated by Respondents, tried to the jury as a simple "false light" invasion of privacy, but rather on the intrusionary physical trespass of the respondents and the resulting fictionalized, defamatory false light publication.

The Court of Appeals made no finding "that the article was newsworthy–" as asserted at page 10 of Respondents' Brief.

Neither the District Court, the jury nor the Appellate Court below found that the article was non-defamatory.

Contrariwise, the Opinion of the Court of Appeals (App. 121, 122) clearly points out that "The Sunday Magazine of the Cleveland Plain Dealer for August 4, 1968 carried as its lead feature a story entitled, "Legacy of the Silver Bridge"; that: "The complaint alleged that the privacy of the plaintiffs had been violated by the intrusion of the newsman and photographer, for unreasonable publicity about their private lives and for falsely presenting their condition and making them objects of pity and ridicule".

It is respectfully submitted that the evidence and proofs put to the jury were in support of both the intrusion and the false light defamation as asserted in the complaint. The Court of Appeals (App. 125) observes: "The two newsmen may have been guilty of a trespass against the property of the Cantrells". In view of the positive finding of the jury in regard thereto, it is respectfully submitted that the observation of the learned Court of Appeals is at this juncture an

understatement; but the record is devoid of any contrary holding below, so as to justify the argument of Respondents that the case is solely based on the "false light" publication.

Respondents' capable counsel incorporate in their argument unwarranted implication that the courts below have made a determination that the newspaper article complained of was not defamatory. At page 14 of Respondents' Brief, the following:

> "The right of the people to know is not served, and freedom of the press is not guaranteed, if, as in this case, Courts determine that a newspaper article is not defamatory, . . ."

II.

RESPONDENTS' ARGUMENTS ARE BASED ON THEORY NOT APPLICABLE HEREIN AND MISCONCEPTIONS OF APPLICABLE LAW.

Having launched their argument on the misstatements that the Appellate Court below "found that the article was newsworthy–" and "not defamatory", Respondents depart from the record entirely, ignore the affirmative special jury verdict on the issue of invasion of plaintiffs' privacy, (App. 114-115), the District Court's instruction to the jury as to the asserted intrusory invasion complained of, (App. 99), Respondents' failure to either plead or argue below that any current "news" event occasioned the publication; and would now urge

that the precise factual and legal gounds for "public interest" dismissal in Time, Inc. v. Hill justify dismissal herein. In fact no current news event related to either the Silver Bridge disaster or to the Cantrells when the false, fictionalized feature story here involved was conceived by the writer or his editor, or when it was published; and no such "news" was alluded to in the article; yet Respondents argue that it was "newsworthy", without setting forth any legal support for such assertion.

"Newsworthy" is defined in Webster's New Twentieth Century unabridged Dictionary as: "a. having the quality of news; timely, important, and interesting".

Contrary to the statement of the learned Appellate Court (App. 129) that "No test has been authoritatively formulated for judicial review of "newsworthiness' in these cases", the law has indeed not only clearly differentiated "news" from creative writing, but has historically protected the right of the public to news and the right of the creative writer to his property in his writings.

Bouvier's Law Dictionary, 1928 edition, defines news, and distinguishes it from other writings as follows:

> "NEWS. Information respecting current events. The history of the day. It is not the creation of the writer, but is a report of matters that ordinarily are publici juris. 248 U.S. 234. There is a distinction between the substance of the information (news element), and the particular form or collocation of words in which the writer has communicated it (literary element)."

Bouvier's reference to 248 U.S. 234 is to the celebrated and instructive case decided by the Supreme Court in 1928, *International News Service*, Petitioner, v. *Associated Press*, 63 L.Ed. 211, wherein, contrary to the present-day arguments of the publishers that Constitutionally guaranteed freedom of the press entitles them to unhampered access to source for news, the petitioner association of publishers urged that since it cost substantial investment in obtaining news that it became the property of the publisher to the exclusion of any competitor to reprint same. This Honorable Court held that while there is no property in news, trade decency should require acknowledgment of the source when it is lifted from a competitor's publication. Moreover, while acknowledging that an article may combine news with creative literary writing, nevertheless:

> "But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (Const. art. 1, S 8, P. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."

The Supreme Court noted (p. 235) in that case that:

> "The peculiar value of news is in the spreading of it while it is fresh;"

Webster's definition of "news" was further written into law by the United States Court of Appeals for the Seventh Circuit in the case of *Wagner v. Fawcett Publications*, 307 F.2d 409, 411.

There has been no modern "re-definition" of "news"; and therefore try as they might Respondents cannot but urge that in order to sustain their unique application of the term "newsworthy" to the facts in the within case, that this Honorable Court should now effect such re-definition.

III.

THE FIRST AMENDMENT DOES NOT EXPAND THE COMMON LAW LIBERTY OF THE PRESS.

Close attention to the structure of the First Amendment compels a narrower view of press freedom than has been granted by decisional law; but certainly the Amendment does not warrant a widening of such rights.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press". It does not grant a wider freedom than previously was recognized in law, but prohibits legislative narrowing of such freedom.

Bouvier, defining Liberty of the Press, calls our attention to such pre-existing freedom in the following:

> "LIBERTY OF THE PRESS. The right to print and publish the truth, from good motives and for justifiable ends. 3 Johns. Cas. 394.
>
> The right in the publisher of a newspaper to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent that any one else would be responsible. 13 W.Va. 182.
>
> The right to print without any previous license, subject to the consequences of the law. 3 Term 431.
>
> The right to publish in the first instance as the publisher pleases, and without control; but for proceeding to unwarrantable lengths he is answerable both the the community and to the individual. 4 Yeates 267. Liberty of the press means not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords; Cooley, Const. Lim. (422). See Story, Const. SS 1870, 1888, 1891. It is said to consist in this "that neither courts of justice nor any judges whatever are authorized to take notice of writings *intended* for the press, but are confined to those which are actually printed." De Lome, Const. 254.
>
> At common law liberty of the press was neither well protected nor well defined, and not until after many struggles was it so far recognized in England as to permit the publication of current news without the permission of government censors. May, Const. Hist. c.7,9,10. The general publication of parliamentary debates dates only from the

American revolution, and even then was considered a technical breech of privilege; Cooley, Const. Lim. (418). A fair publication of a debate is now held to be privileged, and comments on public legislative proceedings are not actionable, so long as a jury shall think them honest and made in a fair spirit, and such as are justified by the circumstances; L.R. 4 Q.B. 73.

In the colonial period the English practice was followed in this country. In 1649 the general laws were published for the first time in Massachusetts under protest by the magistrates, and in Virginia and New York printing was specially prohibited. The constitutional convention of 1787 sat with closed doors, as did the senate until 1793. By the constitution liberty of the press is secured against restraint in the United States, but he who uses it is responsible for its abuse. Like the right to keep firearms, it will not protect the user from annoyance and destruction caused by him; 3 Pick. 313. The Sedition Act, July 14, 1798, attempted a restriction upon the freedom of the press, but by its terms it was self-limited; its constitutionality was always doubted by a large party, and its impolicy was beyond question. See Whart. St. Tr. 333, 659, 688; 2 Rand. Life of Jefferson 417; 5 Hildr. Hist. U.S. 247; Ord. Const. Leg."

The law has often been required to qualify literary works for purposes of copyright, patent, mail rate privilege, etc., and to qualify "newspapers" for legal advertising publication, inter alia. More recently, for the purpose of preserving "independent and competitive" newspapers which may become victims of economic distress, the Act of July 24, 1970, 15 U.S.C. Commerce

and Trade, sec. 1801 makes it absolutely essential that the courts of the United States continue their judicial concept of a newspaper, and that they not accept the conclusion of the United States Court of Appeals for the Sixth Circuit that the determination of the editors of publications claiming to so qualify should be controlling on the courts.

IV.

CONCLUSION

Wherefore, it is respectfully submitted that the feature story here involved was neither "newsworthy" itself nor privileged by reason of any related "news" report; and being false, fictionalized and defamatory of private persons whose private residence was trespassed upon for the sole purpose of creating such feature article, without any lawful consent or permission in the ultimate publication, that the judgment of the District Court on the verdict of the jury, being compensatory and not punitive, based on evidence of record, should be reinstated, with interest and costs.

Respectfully submitted,

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